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# THE LAW MAGAZINE AND REVIEW.

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## I.—CRIMINALS AND CRIME.

**I**N adopting the title of Sir Robert Anderson's recent volume<sup>1</sup> as the heading for this article I do not mean to imply that it is the first or the ablest statement of the views which the author puts forward in it. It is neither. But it has attracted more public attention than the other writings on the subject. Sir Robert Anderson writes in a popular and lively style. He occupied at one time an important position in the Police of the Metropolis, and until recently, was Head of the Criminal Investigation Department, and his confident assertions will in many cases be accepted by the public, although no statistics or other reasons are advanced in support of them. Then he is potent in vituperation, taking care to express it in such generalities that no particular opponent can reasonably take exception to them—indeed when this is done his reply is "If the cap fits you, you can wear it." In short, he is an adept in the tricks of controversy, but that is not what is required when we are seeking for truth. Nevertheless I think it would not be unreasonable to ask Sir Robert Anderson to substantiate his charges against the Humanitarians by at least one quotation

<sup>1</sup> *Criminals and Crime: Some Facts and Suggestions.* By Sir Robert Anderson. K.C.B., LL.D. London: James Nisbet & Co., Ltd. 1907.

from a recognised writer on that side. For instance, he says in his preface that there is an agitation "persistently maintained by the professional humanitarians on behalf of the professional criminals." I have probably read more humanitarian writings than Sir Robert Anderson, but I have never met one which contained any special defence of the "professional criminals." The contention was a general one to the effect that our present system of sentencing was too severe. But our author elsewhere describes the professional criminals as the "special pets" of the Humanitarians without a word in proof of his allegation. One would indeed imagine from his writings that the Humanitarians had made a number of unprovoked attacks on him instead of the very reverse.

The present book has disappointed me. I expected to find at least an orderly arrangement of materials which the original form of articles excluded, and that the writer's theories would have been laid down in a clear and consistent manner without repetition, confusion or inconsistency. This has not been done. I also hoped that in dealing with "crime and criminals" he would have taken a wider range, and not merely dealt with particular kinds of crime and particular classes of criminals. If wide views are not taken, a writer may be quite unaware of the extent to which his principles would lead him. Take, for example, restitution, on which our author insists so strongly. As restitution in kind can seldom be effected, restitution really means compensation. But where is the justice of requiring compensation from a man who steals my horse, but not from a man who maliciously kills it? And if the man who kills my horse should be compelled to make compensation, why not also the man who deprives me of an eye or lames me for life? There are but few crimes which do not involve injuries for which the injured person might reasonably demand compensation; and treating of restitution in

cases of dishonesty only, without considering the principle in its full extent, and ascertaining whether the assessment of damages could in all cases be conveniently made an appendix to a criminal trial instead of involving subsequent civil proceedings, cannot, I think, lead to any good result. Compensation in cases of dishonesty is not separated by any marked line of distinction from compensation in cases of malicious injury to person or property. Suppose a burglar breaks into my house and steals valuable property, and that on my servant trying to stop him he fires and seriously injures the servant. Is it reasonable to keep the burglar at work for many years in order to compensate me for my loss, while the servant, whose injury has been much more serious, has no remedy at all?

And again, in dealing with punishments, Sir Robert Anderson leaves entirely out of account the amendment of our present prison system, because it does not come within his province. Yet his system of restitution involves the assumption that prison labour (or labour on a penal colony) can be rendered remunerative, so that the prisoner's earnings, after deducting the cost of his maintenance, will leave a surplus applicable to the purpose of restitution. How has this been proved? I doubt if prison labour has ever yet been made really remunerative. The attempt has been made, I am told, in the case of prisoners for debt; but I never heard of a prisoner who was released before the expiration of his sentence because the surplus proceeds of his labour sufficed to pay the sum (perhaps an instalment of a few shillings) for non-payment of which he had been committed. I do not mean to say that remunerative prison-labour is impossible. I think it ought to be tried. But I object to a scheme based on the assumption of remunerative prison-labour, so long as in point of fact it is not remunerative. It would be much more to Sir Robert Anderson's purpose if he could prove that prison-labour



can be rendered remunerative, and that there would, in most cases, be a reasonable prospect of making restitution by this means without an unduly prolonged period of detention. However, the reflection occurs to our author that the thief may have a wife and family dependent on him who would otherwise be thrown on the rates, and he suggests that the cost of maintaining his wife and family, as well as his own maintenance, should be paid out of his earnings before applying the surplus to restitution (p. 152). I hope that when Sir Robert Anderson next deals with the subject he will treat it as a whole, defining the extent to which each of his remedies should be carried, and explaining the reasons for his limitations. He has not, I think, assigned any satisfactory reason for treating persons guilty of dishonesty in a different manner from other prisoners, or given any reason for endeavouring to deal with the general subject of Crime and Criminals, apart from all consideration of the condition of the prisons in which the criminals are confined. If he could give us any useful hints for increasing the reformatory element in prisons and rendering prison-labour more remunerative than at present, it would add much to the value of his book.

Perhaps the most important question in Criminology is: For what purpose do we imprison (or otherwise punish) convicted offenders? A man who tells us how we ought to treat them without making up his mind on this subject is not a man "of light and leading." But I am afraid that Sir Robert's trumpet gives an uncertain sound, and though he is always "ready for the battle," the contest sometimes assumes the features of a "free fight." He states and decides the question pretty clearly at the outset where he considers "the stock reply" to the question "Why do we imprison our criminals"? viz., "first to punish, secondly to deter, thirdly to reform": and he says "this third point may be here dismissed with the remark that if the State is

really responsible to reform its criminals, its methods are singularly ill-adapted to the purpose." I will here pass over this observation with the remark that if our present prison system is singularly ill-adapted for reforming a man we ought not to set down any man as irreclaimable because he has been frequently imprisoned without being reformed thereby. We cannot conclude that a man is irreclaimable until we have made a serious effort to reclaim him without effect. Sir Robert, however, equally rejects the first theory, viz., that we only imprison a man in order to punish him. Punishment, he rightly says, is "merely a means to an end, namely, the safe-guarding of the interests of the community"—which is therefore the real end to be aimed at in imprisonment. The remaining head, "to deter," is resolvable into this. We seek to deter the prisoner from repeating his offence because we shall thereby promote the interests of the community, and—though I think Sir Robert Anderson never notices this important element—we also imprison a man because we expect that his punishment will deter other people from committing the same crime. Owing to this circumstance, the imprisonment or other punishment which fails to deter the particular offender from repeating the crime may not have been proved useless or have failed of its object. It may have deterred other persons, and thus reduced or kept down the general body of crime. The reduction of the general body of crime is what is most desirable for safe-guarding the interests of the public. If a few unusually clever criminals escape our meshes we need not feel much concerned about them.

But when I turn to other parts of the book I find the Author apparently forgetting his own rational principles, and as much at sea on the subject as a judge whose entire knowledge is derived from the sentences that he himself has passed during some twenty years. He writes as if the object of imprisonment was uncertain, and might even be different

in different cases. A "humane judge," he tells us, will hold that punishment "should be regarded as not an end, but merely as a means to an end, namely, reform" (p. 140); but probably this passage is only meant to refer to a particular class of offenders. But he goes on: "Every committal should be made with some definite and justifiable object, *whether it be the prisoner's punishment or his reformation, or merely his detention or some combination of these*" (p. 141). Here it is plain that punishment, *i. e.*, the infliction of pain or suffering, is treated, not as a means either to the safeguarding of the public or to reform, but as an end in itself. He regards it as one of the "justifiable" objects for which a man may be committed to prison. Sir Robert's advice sounds very like "Always have an object in sending a man to prison. It does not much matter what that object is, but when you once decide on your object stick to it, whatever the result may be."<sup>1</sup> I am glad to find Sir Robert Anderson stating: "Without reserve, I maintain that no criminal is irreclaimable, and I earnestly plead for reforms in prison administration that will make reclamation as common as it is now unhappily rare" (p. 173). I hope to see these "earnest pleadings" at greater length in his next publication, but perhaps the leading feature of the present one is his contention that there *are* certain irreclaimable criminals, and that they ought to be locked up for life even though no further effort was made to reclaim them than is done under our present system.

The proposal for which Sir Robert Anderson is best known, and which seems to have obtained the largest amount of support, is that for locking up "professional"

<sup>1</sup> Sir R. Anderson, at p. 64, expresses himself thus: "We should seek to check committals to prison, but we should seek also to make imprisonment answer its purpose *whatever that purpose may be*. Some offenders need punishment, others reformation, and others again are committed mainly to protect the community against their misdeeds." The passage cited in the text is practically a repetition of this one. Both are equally hazy.

thieves for life, or at least for an indefinite period, as irreclaimable, because repeated imprisonments under existing conditions have failed to reclaim them. But what does our author mean by "professional" criminals? In some places he divides them into two classes, "the utterly weak" and "the utterly wicked" (p. 57), but when he speaks of the small number of professional criminals and the consequent ease with which professional crime could be put an end to, he refers to "the utterly wicked" only. His arguments often gain in apparent force by passing from one of these meanings of the term "professional" to the other. The proposal of indefinite imprisonment extends to both classes of professional criminals, but Sir Robert Anderson indicates that he would treat them differently, though I fail to find any clear statement of the difference or of the reasons for it. In both cases the attempt to reclaim the man, or even to deter him, seems to be abandoned as a hopeless task. The object of his imprisonment is merely to prevent him from doing the mischief that he would certainly do if left at large. But I gather that while Sir Robert Anderson would send the "utterly weak" at once to an Asylum Prison, where he would be leniently dealt with, he would imprison the "utterly wicked," first for a definite term under the present conditions, to be followed by detention for an indefinite time in an Asylum Prison. Now if during the first part of this man's imprisonment we hope that what he is undergoing will suffice either to reform or to deter him, why not give him a trial at the end of it, to see whether it has been successful or not? While if we give up the hope of either reforming or deterring the prisoner, what possible benefit to the public is to be derived from his harsh treatment during the earlier part of his imprisonment? All that we can do with him is to protect the public against his depredations by locking him up for the rest of his life. The most lenient treatment will effect

this object equally with the most severe. Why then is he to be punished unnecessarily? Has our author slipped back into treating punishment as an end not a means?

Sir Robert Anderson's favourite description of his proposed system is that it substitutes the punishment of criminals for the punishment of crime. The meaning of this is that in passing sentence the Judge should be guided not merely by the crime of which the person has been convicted, but should also go into his previous history and ascertain what manner of man he is. The great majority of judges do this already, and with many of them—for example, Sir Ralph Littler—the sentence for a subsequent offence differs in a very marked manner from that passed for the earlier one. The change which Sir Robert Anderson proposes is that this consideration of the prisoner's past career should be compulsory in all cases, and might always involve an indefinite sentence. (He adds also a very valuable provision to the effect that the prisoner's past career should be investigated in open Court on sworn evidence.) His reasons for this change do not seem to me very convincing. He says that an inquiry into the prisoner's antecedents may lead to the conclusion that he will, if liberated, return at once to a life of crime, and that, therefore, the only mode of securing the public against his depredations will be to lock him up for life. But I fail to see the paramount necessity of protecting the public against the depredations of Brown, or Jones, or Robinson in particular; and perhaps, if these persons are unusually skilful and crafty thieves, the process of laying them by the heels may cost more than it is worth. One man who looms largely in Sir Robert's pages—Raymond—seems never to have been caught. Sir Robert's scheme would, therefore, have given the public no security against the depredations of Raymond. Moreover, if, whenever the old offender is convicted, he is sent back for a considerable term of penal servitude, his intervals of

freedom will be few and his opportunities of doing serious mischief still more limited. If we should prefer sending him to an Asylum Prison, it is rather because we desire to deal with him leniently than the opposite. But I expected that our Author would have dealt at somewhat greater length with the feasibility of Asylum Prisons, and the possibility of rendering them self-supporting.

But Sir Robert would imprison many persons for life who were very far from being either professional or habitual criminals, who are in no sense "beasts of prey;" though why that designation is to be applied to professional thieves, who rather resemble rats and mice, I do not see. He would lock up for life every thief who did not reveal what he had done with the stolen property, unless he could satisfy the judge that he did not know. Now take Mr. Beck, or any other victim of mistaken identity. His only way of satisfying the judge that he did not know what had become of the stolen goods, would be to convince him that he was not the thief. What chance would he have of doing this? Unless he invented lies and tried to palm them off on the judge, his fate would be sealed irrevocably. It would not be indefinite imprisonment in this case. It would be imprisonment for life (p. 27). And the fact that by telling what he had done with the stolen property the prisoner might have to implicate a father, mother, brother, sister, wife or child, would be no excuse. Imprisonment for life would always be the result of refusal. And all this would arise simply from the fact that restitution would be facilitated by giving the information in question. I think most of my readers will be of opinion, that while restitution may be a very good thing in its way, it is far better to have no restitution than to enforce it by such means as this.

But giving all information about the disposal of the stolen property does not relieve the thief from the necessity of making restitution on, according to our author, "a liberal

scale," *e.g.*, in the Beck case, leaving the women to put their own values on their trinkets, for I do not see what other method could have been resorted to, inasmuch as none of the stolen articles was traced. This restitution Sir Robert proposes to make by forced labour under very unfavourable conditions, and a mere schoolboy's freak, if it involved a loss of some pounds, might involve a prolonged period of—shall I say penal servitude? Moreover, as the prisoner's maintenance would be a first charge on the proceeds of his labour, a fit of illness might throw him back almost indefinitely when the debt had been almost cleared off. But I suppose there would be a number of prisoners who from ill-health, physical infirmity, weakmindedness, &c., would never be able to earn more than enough to provide for their keep. Would Sir Robert Anderson keep these prisoners in gaol at the public expense in a fruitless effort to make restitution? or if not, would he liberate them? On the latter alternative, numbers of prisoners who could never hope to be released, on making restitution would try to do as little and as badly as possible in hope of procuring a release, because the proceeds of their labour was insufficient to pay for their maintenance. Sir Robert Anderson describes his system as fitting the punishment to the criminal, not to the crime. Are we fitting it to the criminal or to the crime when we require a thoughtless boy to work out restitution to a wealthy employer by years upon years of forced labour, especially if under more favourable conditions he could have earned the requisite sum in perhaps a few months? But I am entirely opposed to the system of restitution by forced labour. When a man is sent to prison or kept at forced labour for non-payment of a debt, that debt at once assumes a preferential character over all others. If a man has two debts, and is unable to pay both, the creditor who can imprison him will be paid, and the creditor who cannot imprison him will not.

I was often surprised in reading this volume at the confidence of Sir Robert Anderson's assertions, and the scantiness of the proof offered in support of them. Where, for instance, are his proofs that "professional crime" (whether that phrase is used in the wider or the narrower sense) has been increasing for some years past more rapidly than the increase of the population will account for? (though I may remark that the progress of education may naturally be expected to be accompanied by an increase in crimes which require education on the part of the perpetrator). Accuracy is certainly not his forte. He tells us (p. 160) that the public has generally fallen into an error as regards the *Beck Case*, on which he undertakes to set them right. In point of fact Sir Robert is himself utterly and absolutely wrong. The evidence which was excluded at Beck's trial (in 1896) was to the effect that the crimes in question were not committed by the prisoner, but by a different man named Smith—to whom they could be brought home by the hand-writing of the documents in Court. No allegation was made at this trial that Beck was an old offender, and he was not sentenced as such.

Though Sir Robert Anderson sometimes expresses himself as if he were unwilling to send convicted persons to prison, he calls the short-sentence system "a craze." Apparently, however, it has as good results to point to as the long-sentence system, and some of the objections urged against it seem to be very weak. The prisoner is not left long enough in prison, it is said, to derive the full benefits of his imprisonment. But if, as Sir Robert Anderson admits, imprisonment has at present no reformatory effect, we do not hasten his reformation by substituting six years' imprisonment for six weeks. We are told again that without pretty long terms of imprisonment prison labour cannot be made remunerative. But has it been made remunerative where the terms have been long? And I fear that working in prison at remunerative labour will not ensure the employ-



ment of the prisoner at similar labour on his discharge. Sir Robert Anderson indeed writes "the development of practical philanthropy makes it possible for every offender on leaving prison to return to honest labour" (p. 11). But there are strong reasons for doubting the truth of this statement.

Sentences have long been the opprobrium of our administration of justice, and it is high time to do something to remedy the evils complained of. But now that we have got a Court of Criminal Appeal to which every prisoner convicted on an indictment can appeal for a revision of his sentence, it is to be hoped that we shall soon be in possession of a fairer and more rational system of sentencing. If the new Court should express an opinion in favour of instituting Asylum Prisons where criminals could be detained for longer periods, but under more lenient conditions than in our present prisons, this proposal should be fully and fairly considered. But many of Sir Robert Anderson's proposals seem less defensible than this one. Those with regard to restitution strike us as the worst. I presume it is with regard to these that he charges Humanitarians with sympathising with the criminals and not with their victims. But his sympathy is not of an expensive kind. It costs the sympathiser nothing. It leads to harsh treatment of the offender, but to no alleviation of the victim's condition, except what is exacted from the offender by this harsh treatment. Indeed, Sir Robert's practice here does not seem to be in agreement with his precept. He was the victim of a robbery, one of the offenders being a servant-woman in his employment who would not give information as to what had become of the stolen property, her object being to screen a guilty lover. Imprisonment for life, says the theorist, should have been her doom, but instead of that he induced the Judge who tried the case to liberate her under the First Offenders' Act. He was right, but I am afraid he had more sympathy with the offender than the victim.

## II.—SIR SAMUEL ROMILLY.

ONE of the most attractive figures in the history of English law is Sir Samuel Romilly, eminent alike as a jurist and a politician. To study his character is to admire it. His mind and soul were as clear as crystal, unstained in their integrity. Grattan speaks of the all-enlightened perfection of his understanding. The writer of a little volume, entitled *Criticisms on the Bar*, and published in 1819, prefixes as a motto to a sketch of Romilly a passage from Sir Philip Sydney's *Arcadia*, "a piercing wit quite void of ostentation; high-erected thoughts seated in a heart of courtesy; an eloquence as sweet in the uttering, as slow to come to the uttering." This description has always appeared to the present writer singularly apt as applied to Romilly. Mr. Augustine Birrell happily eulogises him in one of his essays. "Among the many brilliant lawyers," he says, "who have, like birds of passage, flitted through the House of Commons on their way to what they thought to be better things, I know but one of whom I could honestly say, 'May my soul be with his!' I refer to Sir Samuel Romilly, the very perfection, in my eyes, of a lawyer, a gentleman, and a Member of Parliament, whose pure figure stands out in the frieze of our Parliamentary history like the figure of Apollo amongst a herd of satyrs and goats."

Samuel Romilly, who was born in 1757, was the son of Peter Romilly, a jeweller in Soho, and was the grandson of a French Protestant who had left France to practise his religion peacefully in liberty-loving England. His early life was spent in close touch with French influence. It was the rule of his family to speak French every Sunday at home, and to attend the French Reformed Church once a fortnight. In his youth Romilly worked in his father's shop, but he soon found his duties uncongenial, and entered as a student

at Gray's Inn. He records that there was only one row of houses between his chambers and Highgate and Hampstead, so that the north-west wind, sharp and piercing, blew full against them. During the No-Popery outbreak of 1780, when his Inn was menaced by the rioters, he did sentry duty at the Hôlborn gate. In 1783 he was called to the Bar, and entered upon the career which was to prove so successful. He states that one reason for his adopting a legal life was his admiration for the life of the great French lawyer, Daguesseau. "The works of Thomas had fallen into my hands," he says. "I had read with admiration his *éloge* of Daguesseau, and the career of glory, which he represents that illustrious magistrate to have run, had excited to a very great degree my ardour and my ambition, and opened to my imagination new paths of glory."

Romilly quietly but steadily rose in his profession. In 1800 he became King's Counsel. In 1806 he entered Parliament, and became Solicitor-General in the ministry of All the Talents. In 1818 he died under melancholy circumstances. On the 29th of October of that year his wife, to whom he was devotedly attached, passed away. He was so profoundly affected by his loss that on the 2nd of November he took his own life. He was universally mourned, and his death was lamented by all parties as a public calamity.

The name of Romilly, as a politician, is especially associated with the mitigation of the penal code. At the beginning of the century criminal offences were punished with a severity out of all proportion to their seriousness. The number of crimes which were punishable by death was innumerable. As it was impossible to hang men wholesale, the greater number of those convicted and sentenced to death at every assizes were respited, after hearing the sentence of death solemnly pronounced upon them. This system made the lives of the convicts dependent upon

the caprice of the judges, and led to many acts of injustice. Crime was fostered rather than prevented by the barbarous system of Criminal law then existing. Romilly took up the task of mitigating the rigour of the criminal system and fighting against the abuses connected with it. In 1808 he abolished the penalty of death in cases of private stealing from the person. He tried to carry out a similar reform in regard to shop-lifting, and stealing in dwelling-houses and on navigable rivers, but without success. In 1811 he substituted transportation for death in cases of stealing from bleaching grounds. In the following year he repealed the Statute (39 Eliz., c. 1), which made it capital for soldiers and sailors to be found vagrant without their passes. It was on his motion that the Parliamentary Committee was appointed which in 1812 reported against the utility of transportation and confinement in the hulks. In 1814 he mitigated the harshness of the law of treason and attainder. Romilly's efforts were strongly opposed by those who feared the consequences of lighter punishments. Year after year his Bills were rejected, and the amount of reform actually accomplished by him was small. But the poet has told us—

“How far high failure overtops the bounds  
Of low successes.”

Romilly opened the eyes of his countrymen to the barbarity of their penal code, and created a state of public feeling which enabled others to do the work which he had failed in doing.

It is quite extraordinary to read the flattering testimonies to the character of Romilly that are to be found in the biographies and memoirs of his time. Even a man like the cynical Creevey had nothing but praise for Romilly. “His loss,” he said, “is perfectly irreparable.” When the Duke of Wellington once remarked to him that the House of Commons never liked lawyers, Creevey replied that that

was true generally, and justly so, but he added that Horner and Romilly had been exceptions. He remarked, "that they were no ordinary artificial skirmishing lawyers, speaking from briefs, but that they conveyed to the House, in addition to their talents, the impression of their being really sincere honest men."\* Lord Brougham devoted a chapter to Romilly, in his sketches of the statesmen of the time of George the Third. His account of Romilly is one long eulogy of his "rare excellence." He regarded him as unquestionably the first advocate and most profound lawyer of the age in which he flourished. Language is exhausted in the catalogue of Romilly's fine qualities. A capacity of the highest order; an extraordinary reach of thought; great powers of attention and of close reasoning: a memory quick and retentive; the most persevering industry; a fancy eminently brilliant, but kept in perfect discipline by his judgment and his taste, which was nice, cultivated, and severe, without any of the squeamishness so fatal to vigour. Those, according to Brougham, were the qualities which, under the stimulus of a lofty ambition, placed him among the chief ornaments of Parliament.

So laudatory are the contemporary accounts of Romilly, that it is almost a relief to find that there were some who did not regard him as faultless. Men conscious of integrity and high motives are sometimes prone to adopt a certain air of lofty superiority that is galling to humbler men. Somebody once said of Gladstone that he addressed the House as if the Ten Commandments had just been delivered to him from Sinai. A similar complaint was made about Romilly. Hazlitt tells us that he did not like Romilly's oracular way of laying down the law in the House. He speaks of his self-important assumptions of second-hand truths and his impatience of contradiction, "as if he gave his time there for nothing."

Bentham also professes to find flaws in the great lawyer.

He hints that in the Court of Chancery and the House of Commons he played the part of toady to the Chancellor, Lord Eldon. "Romilly," says Bentham, "had the ear of the Chancellor and trusted to his influence over the Chancellor, and so he got some of his little miniature reforms adopted. Had they been considerable, they would have been resisted with all Lord Eldon's might." Bentham claimed that Romilly was largely his mouthpiece, and that he himself was the real author of his friend's reforms. "To Romilly," he says, "with that secrecy which prudence dictated, my works, such as they are, were from first to last a text-book. . . . Not a *reformatiuncle* of his (as Hartley would have called it) did Romilly ever bring forward, that he had not first brought to me, and conned over with me." Bentham frequently writes of Romilly in a sneering sort of way that excites one's resentment. He was not, however, a particularly amiable character, and allowance must be made for the influence of jealousy in his references to his friend.

Romilly's connection with France made him keenly interested in French politics and history. He watched the progress of the French Revolution with keen interest, and was friendly with many of the leading politicians of France. He knew Mirabeau, and Dumont of Geneva, the friend of Mirabeau, Diderot, D'Alembert, and the Abbé Raynal. He was a great admirer of Rousseau both as a writer and a philosopher. "After reading Rousseau," he says on one occasion, "I am inclined to confess that, after all, my favourite Cicero '*n'était qu'un avocat.*'" He frequently visited Paris and attended the sittings of the National Assembly. When Mirabeau became a political leader, it was to Romilly that he applied for an account of the procedure used in the British House of Commons. In the biography of Romilly, issued by his sons, there are many letters to and from friends in France, from which

much interesting information about the Revolution may be gleaned. It is interesting to learn that the opponents of Romilly, like those of Disraeli, sometimes used his foreign ancestry as a weapon against him. In one of his speeches during his candidature for Bristol in 1812, to take a single instance, he is found denying that he is a foreigner, and stating that he and his father had been born in England. The present writer, however, inclines to think that Romilly was not altogether free from the influence of heredity. Romilly cherished a strong antipathy to the Pitts, father and son, and would not allow to either of them the designation of great men. The present writer is disposed to think that this hostility was partly due to the fact that Chatham and his son had inflicted such severe blows on his ancestral country.

Romilly possessed culture and literary taste. This contributed to his success in the House of Commons. It is often said that lawyers are seldom successful in Parliament. Many a man holding the first rank at the bar has been a complete failure in the House of Commons. It was this fact, perhaps, that led Disraeli to put into the mouth of Vivian Grey the remark, "To be a great lawyer I must give up my chance of being a great man." This is largely because the successful lawyer is seldom more than a lawyer. It will almost invariably be found that the barristers, who are successful as Parliamentarians, are men who have devoted some portion of their leisure to literary and intellectual pursuits outside the law. Principal Shairp has told us of Lord Chief Justice Coleridge that—

"The hushed senate has confessed his spell,"

but he has partly given us the reason when he says,

"Whate'er of beautiful or poet sung,  
Or statesman uttered, round his memory clung."

Lord Mansfield and all the Scottish Chancellors, Loughborough, Erskine, Brougham, Campbell, were men of great

influence in the House of Commons, but they were also men whose minds had been saturated with literature. Some two or three years ago Sir Edward Carson, speaking to a body of law students, dwelt upon the narrowness of lawyers, and advised his hearers, having once gained a sufficient knowledge of law and legal procedure, to study history and literature and affairs, and, above all, human nature.

Sir Samuel Romilly prepared himself for the triumphs of later years by laying an extraordinary wide foundation of culture in his youth. He was an assiduous student of oratory. The famous lawyers of the past, Mansfield and Erskine, Brougham and Romilly, recognised that no man could be a good advocate who was not also a good speaker, and they believed in the study of oratory. Romilly, like many other great jurists, was a great admirer and student of Cicero. The great lawyers of the eighteenth century knew where to go to learn their business. They were not satisfied with the cheap fluency and common-place diction of the debating societies. They wished to be eloquent, and they went to the fountain head of Roman oratory. Romilly read the whole of Cicero, with the exception of one or two treatises. He studied and translated the most celebrated of his orations, his *Laelius*, his *Cato Major*, his treatise *De Oratore* and his *Letters*. He also read the whole of Livy, Sallust and Tacitus. He read Terence, Virgil, Horace, Ovid, and Juvenal again and again. To improve his style he translated almost all the speeches in Livy, the whole of Sallust, and much of Tacitus. With the same object of improving his style, he read and studied the best English writers, Addison, Swift, Robertson, and Hume, noting down every peculiar propriety and happiness of expression which he met with, and which he was conscious that he should not have used himself. He was a careful student of Bolingbroke, and expressed the opinion that, if his delivery was equal to his style, as Lord Chesterfield said it was, he was,



at least, capable of rivalling Cicero. He endeavoured also to acquire much general knowledge. He read a great deal of history. He wrote political essays and used to send them anonymously to the newspapers. He was anxious to acquire facility of elocution; but, instead of resorting to debating societies, he adopted an expedient suggested in Quintilian. He cultivated the habit of expressing to himself in the best language he could, whatever he had been reading. He used the arguments he had met with in Tacitus and Livy, and mentally composed with them speeches of his own. Occasionally, too, he attended Parliament, and used to recite or answer in thought the speeches he had heard there.

The reward of all Romilly's labour came in his later years, when he was universally recognised as an orator of the first distinction. Lord Brougham says of his eloquence, that "it united all the more severe graces of oratory, both as regards the manner and the substance. No man argued more closely when the understanding was to be addressed; no man declaimed more powerfully when indignation was to be aroused or the feelings moved. His language was choice and pure; his powers of invective resembled rather the grave authority with which the judge puts down a contempt, or punishes an offender, than the attack of an advocate against his adversary and his equal. His imagination was the minister whose services were rarely required and whose mastery was never for an instant admitted. His sarcasm was tremendous, nor always very sparingly employed. His manner was perfect in voice, in figure, in a countenance of singular beauty and dignity, nor was anything in his oratory more striking or more effective than the heartfelt sincerity which it throughout displayed in topic, in diction, in tone, in look, in gesture." He could even be eloquent in the law Courts. "The reply," says Brougham, "even as reported in *11 Vesey, Junior*, in

the cause of *Hugonin v. Beasley*, where legal matters chiefly were in question, may give no mean idea of his extraordinary powers." The case mentioned was a case in which Lord Eldon set aside a voluntary settlement by a widow upon a clergyman and his family, on the ground of having been obtained by undue influence. The arguments used were of a non-technical character, and lent themselves to oratorical treatment. It is characteristic that Romilly quotes Cicero. It may be pointed out that in the preface to Volume IX of the *Revised Reports*, Sir Frederick Pollock says, "*Hugonin v. Beasley* is perhaps the only modern case in which a reported argument (that of Sir Samuel Romilly) has acquired by later judicial approval an authority equal to that of the judgment itself."

It has already been stated that the work actually accomplished by Romilly in the direction of mitigating the penal code was small. But his was the part of the man who sows the seed. The influence of his teaching was shown by the legislation of later years. Without the sowing of the seed, there can be no harvest. When the harvest comes, some of the praise is surely due to the dead sower. Sir Walter Scott wrote some lines on Pitt, who also sowed the seed for a harvest which he never saw. The lines are equally applicable to Romilly.

"Round the husbandman's head, while he traces the furrow,  
The mists of the winter may mingle with rain,  
He may plough it with labour, and sow it in sorrow,  
And sigh while he fears he has sow'd it in vain ;  
He may die ere his children shall reap in their gladness,  
But the blithe harvest-home shall remember his claim ;  
And their jubilee-shout shall be soften'd with sadness,  
While they hallow the goblet that flows to his name."

J. A. LOVAT-FRASER.

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### III.—WOMAN'S EXPATRIATION BY MARRIAGE.

NATIONALITY can be acquired by birth, by naturalization, and by annexation; it can also be acquired by marriage, and it is a mistake to suppose that in no case can marriage affect the nationality of a man.

The legal effect of marriage upon the status and nationality of woman is one that concerns a vast number of persons, especially at the present day when international marriages are so frequent. In different countries and among different people the law on this subject varies, and while ordinarily it has been generalised and stated in broad terms that on marriage woman becomes of the same nationality as her husband, this is by no means always the case. There are many exceptions to this general rule, and, in order to reach a clear and proper conception of what the law is on this subject, one is obliged to review the legislation of different nations.

Allegiance is the tie or *ligamen* which binds the subject or citizen to the State in return for that protection which the State affords him; and it is a maxim in law that protection and subjection are reciprocal. Natural allegiance is such as is due from natural-born subjects or citizens, and cannot be severed or altered by any change of time, place or circumstances, nor by anything but the united concurrence of the will of the individual and that of the legislative power combined.<sup>1</sup>

By the Common law natural allegiance was perpetual, and being so, a woman by marriage with a foreigner could not change her nationality. One could not expatriate himself without the consent of his Government, accompanied by some definite act on his part manifesting a purpose so to do. A citizen could not change his allegiance or free himself from the obligations of citizenship at his own

<sup>1</sup> Stephen, Vol. II, 432.

will. This could only be done with the consent of his Government. Expatriation could not occur without the intervention of the power to which the citizen owed allegiance, and, consequently, self-expatriation was unknown. Expatriation is a personal privilege. \* It cannot be exercised against the free will of the individual, and cannot be forcibly exercised by anyone else for him. It is a right essential to civil liberty. The tie which binds together a government and its subjects or citizens, and which creates the reciprocal obligations of protection and obedience, can be dissolved only in such a mode as has the assent of both parties. So far as concerns the Government, this assent must be expressly made, or must be inferred from the fundamental or statutory provisions by which the action of the Government involved is regulated. A change of allegiance, a throwing of it off on the part of a citizen, involves on the part of the Government an acquiescence from that department of government which, according to its constitution, must acquiesce in it, and on the part of the citizen the manifestation of the purpose to expatriate himself by some unequivocal act, which act must also be recognised by the Government to be adequate for that purpose.<sup>1</sup>

The tendency of the Civil law, however, always jealous to hold intact the institution of the family, and maintain the supremacy and authority of the father or husband of the family, encouraged the doctrine that marriage changed nationality, and the Codes of almost all Latin countries contain provisions to this effect. The majority of foreign text-writers on Civil and International law favour this principle, and advocate its universal adoption as a social necessity in order to maintain the family institution.<sup>2</sup>

Legislation on this subject is nearly universal. Thus, a German woman loses her nationality upon marriage with a foreign subject. A foreign woman acquires Austrian

<sup>1</sup> 7 Wheat. 283; 2 Cranch 82.

<sup>2</sup> *Fiore Droit Int.*, sect. 386.

nationality on marrying an Austrian subject. An Austrian woman loses her nationality on marrying a foreigner, and she cannot legally reserve to herself her Austrian nationality on marriage. Where a Hungarian woman marries a foreign subject she loses her nationality. Upon marriage with a Bulgarian a foreign woman becomes Bulgarian. On the marriage of a Bulgarian woman with a foreigner she loses her nationality. In England a married woman is deemed to be a subject of the State of which her husband is for the time being a subject. The principle of the French law applies to the Grand Duchy of Luxemburg. Mexican nationality is lost on marriage with a foreigner unless the law of the foreigner transfers his or her nationality upon the Mexican. A foreign woman acquires Portuguese nationality by her marriage with a native. A Portuguese woman loses her nationality on marriage with a foreign subject, provided that the law of his nationality confers his nationality on her. There does not seem to be any legislation on this subject in Roumania. A foreign woman acquires the nationality of her husband upon marriage with a Russian subject. A Russian woman loses her nationality upon marriage with a foreign subject. A foreign woman becomes German by marriage with a German subject. A Norwegian's marriage with a foreign woman makes her Norwegian. In Switzerland, the question is left to the Legislatures of the several Cantons, although it is generally accepted that a foreign woman marrying a Swiss loses her nationality of origin and becomes Swiss. A foreign woman marrying a Belgian assumes Belgian nationality. A Belgian marrying a stranger loses her nationality. The Brazilian law, following the French Code, provides that "*La femme Brésilienne mariée à un étranger suivra la condition de son mari.*" Authors are divided as to what the word "condition" means, and by a decree of the Council of State, 1868, the word is officially interpreted to mean the civil condition of the

husband, and not to refer to the nationality of origin. Greek nationality is acquired by a foreign woman marrying a Greek, and is lost on the marriage of a Greek with a foreign subject. "*Le droit de Bourgeoisie*" is acquired by a stranger marrying a Spanish woman and living with her within the territory of the kingdom. Marriage of a Spanish woman with a foreign subject denationalizes her. Marriage with a foreign woman makes her a Swedish subject. A Swede loses her nationality on marriage with a foreigner. In Turkey a stranger who marries a Turk becomes a subject of the Sultan, while an Ottoman marrying a foreigner follows the nationality of her husband. The rule prevailing in Hayti is that the nationality of a woman follows that of her husband; if a Haytian she loses her citizenship and is deprived of the right of owning real property, and if a stranger she *ipso facto* becomes a Haytian, and can immediately exercise and acquire all the rights of a citizen.

The stranger who marries a Venezuelan becomes a citizen. In the Republic of Columbia free foreign women become citizens on marrying a Columbian.<sup>1</sup> In Bolivia, Argentine Republic and Venezuela, a man who marries a native woman becomes of her nationality, and at the time of the French Revolution the same rule prevailed in France.

According to French and Italian law, in order that a woman should upon marriage with a foreigner lose her nationality, it is necessary that the law of her husband's country should, by express legislative authority, confer his nationality upon her. If it does not, then she conserves her nationality, and the husband and wife still remain citizens of different countries. It is necessary, therefore, in order to fix the nationality of a married woman, to ascertain not only the nationality of her husband, but also whether, by the law of his country, his nationality is conferred on his wife by marriage. If it does, then the wife's nationality

<sup>1</sup> Calvo, sects. 634, 635.

follows that of her husband, but if it does not, then the wife retains her original nationality, and the husband and wife remain citizens or subjects of different countries.

As the law of Chili does not confer its nationality upon a foreign woman marrying a Chilian, it has been held that a French woman conserved her status as a French citizen after her marriage.<sup>1</sup>

Some remarkable instances of a "man without a country" have occurred in France. A Mexican gentleman came to France, where his children were being educated, and remained there over ten years without asking permission of the Mexican Government to prolong his absence, this being under Mexican law a forfeiture of his Mexican nationality. One of his sons married a German, a native of Cologne, and in divorce proceedings the question of his nationality came up for discussion. The Court held the son was a *heimatheos*—a man without a country—because his father had lost his Mexican nationality and not acquired French nationality, and therefore, his wife had retained her nationality of origin, which was German.<sup>2</sup>

This question again came before the Tribunal Civil de Nantes in 1901 in an action for divorce. An Austrian had settled in France after having left his native land twenty-five years before. By Austrian law he had ceased to be Austrian, and by French law he had never become French, so he was held to be *heimatheos*—a man without a country—and his wife by her marriage had not ceased to be French.<sup>3</sup>

An English woman married an Ottoman. He dying, she took another Turk for her second husband. In an action for divorce brought by her in France, the French Court held that under English law she lost her English nationality on her marriage, but as the law of Turkey did not confer

<sup>1</sup> Clunet, 1902, p. 579.

<sup>2</sup> Trib. Civil de la Seine, May 1897.

<sup>3</sup> Clunet, 1902, p. 590.

Turkish nationality on a woman on marriage, she did not become under Turkish law an Ottoman; therefore she was neither English nor Turkish—she had no nationality.<sup>1</sup>

In Switzerland, where a native Swiss married a *heimatheos*, it was held that she did not thereby lose her national character.

An illustration of the extent to which the doctrine of merger by marriage has been carried is found in a French case, where, although a bigamous marriage in a foreign country had been declared a nullity, yet it was held that this illegal and null marriage had changed the nationality of the woman who had thereby become French.<sup>2</sup>

In all Mahommedan countries where the *Koran* prevails, the personal status of individuals is divided into two categories, faithful and infidels, the latter forming no part of the religious society of the native, and simply being tolerated on their territory. Therefore, where a Christian or even an Israelite marries a Mussulman, she still remains a stranger and does not abandon her nationality of origin.<sup>3</sup> Consequently, the Courts of Tunis have decided that where a Frenchwoman married a Moor the wife retained her French nationality.<sup>4</sup>

While it is generally conceded that a woman of foreign birth marrying an Ottoman acquires by marriage the nationality of her husband, yet there exists no law on this subject. On the other hand, it is admitted that an Ottoman marrying a foreigner preserves her nationality.<sup>5</sup>

The Common law, prevailing in the United States prior to legislation on this subject, was considered by the Supreme Court in 1830, in a case which involved the question, whether a native-born South Carolinian became a British subject upon her marriage with a British officer. The Court, after referring to the capture of Charlestown by

<sup>1</sup> Clunet, 1893, p. 1167.    <sup>2</sup> Sirey, *Codes Anno.*    <sup>3</sup> Clunet, 1898, p. 132.

<sup>4</sup> *Ibid.*, p. 606.    <sup>5</sup> *Journ. du Droit Int. Privé*, 1891, p. 601.



the British, held that the temporary occupation by them did not annihilate the allegiance of the inhabitants of the State of South Carolina, nor did marriage produce that effect, because the marriage of an alien with a friend or enemy produces no dissolution of native allegiance of the wife. It might change her civil rights, but it did not affect her political rights or privileges. The general doctrine then was, that no person could by any act of his own, without the consent of the Government, put off his or her allegiance and become an alien. "If it were otherwise," said the Court, "an alien would by her marriage become *ipso facto* a citizen, and would be dowable of the estate of her husband, which is clearly contrary to law."<sup>1</sup>

The vast hordes of immigrants who swept over the United States from Europe with their wives and children, and the necessity of clothing them with the political status of the new country of their adoption at the earliest possible moment, in order to imbue them with the spirit of nationality, finally led Congress to legislate upon this question.

The Constitution of the United States provides that Congress shall have power to establish a uniform rule of naturalization.<sup>2</sup> It is to be noted that this is an express power to naturalize and not denationalize. Under this authority Congress in 1855 passed an Act providing that any woman who was then or might thereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, should be deemed a citizen.<sup>3</sup> The Courts of the United States have had occasion to pronounce judgment under this law, and while there are a few exceptions, yet the great preponderance of judicial authority is strongly in support of the view that this law only confers the right of an alien woman to become a citizen of the United States, and does not expatriate an American-born woman on her marriage with a foreigner—that Congress has not power under

<sup>1</sup> 3 Peters, 246.

<sup>2</sup> Art. I, sect. 8.

<sup>3</sup> R. S., sect. 1994.

the Constitution to pass a law denationalizing American citizens. It is evident Congress intended to limit the application of this law. It was not to apply to all marriages between Americans and foreigners, or *vice versa*. It was not to apply to native-born Americans; it was only to affect aliens by birth. The language of the Statute makes this clear, for it includes only women who might be lawfully naturalized, and native-born Americans being already Americans by birth could not be naturalized. This distinction of the Statute between foreign-born and native-born women becomes essential when we consider the present confused state of the law in the United States on this question, which has not yet been definitely determined by the Supreme Court of the United States.

It is admitted that by the law of England and the United States an alien woman on her marriage with a subject or citizen merges her nationality in that of her husband. But the converse has not heretofore been established as the law of the United States, and it was not until the Naturalization Act of 1870 that an English woman lost her quality as a British subject and was deemed to be a subject of the State of which her husband is for the time being a subject. The United States has until this year been one of the few countries where the nationality of a native-born woman is not on marriage merged in that of her husband. By the exceptional law of the United States, until the recent Act of Congress, a native woman marrying a foreigner remained a subject of her State, though an alien woman marrying an American citizen became herself naturalized.<sup>1</sup>

It has been held that, as the Act of 1855 only provided for the case of an *alien woman* by marriage becoming a citizen, it did not authorise any inference that Congress meant to declare the converse, viz., that a *citizen woman* by marriage with an alien should become an alien. The law is in such

<sup>1</sup> Hall, *Int. Law*, sect. 70.

well-considered and guarded terms as to forbid any extension of it by implication. The public policy of the United States on the subject of immigration has been based upon its interests. A continent was to be populated. Vast tracts of land were to be settled and occupied chiefly by foreigners. Therefore Congress has uniformly encouraged and fostered the immigration and naturalization of foreigners in every proper way. Congress considered the investiture of an alien with the rights of citizenship as an advantage in the reception of which acquiescence might be presumed, which would be far from true as to the loss of those rights by a citizen. The relation of husband and wife was dealt with by Congress only in the furtherance of this public policy of the nation, and the Statute was not intended as a general enactment upon the consequences of marriage between people of different nationalities. Therefore, if inference is to be resorted to upon the subject, the motive on the part of Congress for making an alien woman a citizen by her marriage with a citizen, would have been the very reason for its not intending the converse—that a citizen woman by marrying an alien should become an alien.<sup>1</sup>

In harmony with the great preponderance of judicial authority, it is important to note that quite recently the French Courts pronounced judgment under the law of the United States regarding denationalization of American women by marriage in a case where an Ottoman in Paris married an American woman. It was held that, while the husband was an Ottoman, yet a native-born American woman of the State of New York did not lose her nationality of origin by the simple fact of marriage.<sup>2</sup>

The case familiarly known as the *Pequinot Case*, which held that on the marriage of an American woman with a foreigner she became of his nationality, is based on such shallow reasoning as to leave it without force as a judicial

<sup>1</sup> 56 Fed. R. 556.

<sup>2</sup> Clunet, 1905, pp. 187.

authority. There, a Frenchwoman, born in France of French parents who emigrated to the United States when she was an infant, but who were never naturalized, married a native-born American citizen. After living with him several years she was divorced, and subsequently married a French citizen who had never become a naturalized American. The Court in that case based its judgment on the Comity of Nations and on the false assumption that if "a native American woman were to go to Paris and marry a Frenchman, by the Statute of both countries she would thereby become a French citizen."<sup>1</sup>

But the Comity of Nations—similarity of principles—will not justify the adoption of the laws of other nations when in opposition to or unless expressly sanctioned by its own. What authority had the Court for holding that the Statutes of both countries were the same? They certainly were not. There is not a word in the Act of 1855 suggesting that an American woman changed her nationality on marrying a foreigner, and it is manifest that the Court ignored both the spirit and the letter of the law in question and disregarded the Constitutional question involved. The Congress of the United States can only adopt such laws as are consistent with the Constitution, and where certain powers are expressly vested in Congress by the Constitution, it cannot be assumed that the converse of those powers is also vested in that body.

The marriage of an American woman with a foreigner is simply a fact in the chain of evidence proving a change of nationality, but it does not in itself work expatriation. The fact of expatriation is to be proved, like any other fact for which there is no prescribed form of proof, that is, by any evidence that will convince the judgment.

Change of nationality has not heretofore been effected

<sup>1</sup> 16 Fed. R. 211.

*ipso facto* by the marriage of a native born American woman with a foreigner. Such marriage is a fact to be taken into consideration, together with other facts, such as a change of actual residence, the removal from the United States to a foreign country and the practical adoption of the home of her husband, which are circumstances tending to prove a change of nationality. Marriage, accompanied by the woman's removal from the country of her birth and her voluntary change of permanent domicil to the country of her husband, may be considered as a renunciation by a native-born American woman of her allegiance as a United States citizen. In no case, however, can expatriation of an American woman be effected without actual removal from the country under circumstances of good faith. The law of the United States has heretofore recognised the principle that a citizen could not be expatriated against his will. If there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with this purpose, the change of domicil is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicil.

Citizenship is a constitutional right. It is a right that in the United States can alone be acquired or lost in accordance with the Constitution. Laws violating or in restriction of or enlarging the powers vested in the Federal Government by the States under the Constitution are void. Congress has not the power to take away constitutional rights and therefore it is powerless to deprive an American-born woman of her American nationality. While she lives within her native land, whether she marries Greek or Hindoo, she retains her inherent right of American citizenship, and can defy the united Executive, Administrative and Judicial authorities of the Federal Government to take from her this sacred privilege: and when abroad she still retains it until by her own act and deed she herself relinquishes the land of her birth.

The Constitution of the United States provides that Congress shall have power to "establish an uniform rule of naturalization." This is an express power to naturalize. It is a power to make citizens—to extend the privileges of nationality to those who seek a new home upon our shores—a power to receive and welcome into the fraternity of our national life the foreigner from abroad. But here the power of Congress ends. The Constitution does not vest in Congress the power to denationalize. It does not authorise Congress to pass laws for the casting off of American nationality. Whatever doubt upon this question may have existed, was finally put to rest by the Supreme Court of the United States in 1897, when it held that the power of naturalization vested in Congress by the Constitution is a power to *confer* citizenship, not a power to *take it away*.<sup>1</sup>

In the judicial annals of the United States no name stands forth with greater lustre than that of Chief Justice Marshall. In the language of that great jurist, "a naturalized citizen "becomes a member of society possessing all the rights "of native citizens and standing in the view of the Constitution on the footing of a native. The Constitution "does not authorize Congress to enlarge or abridge those "rights. The simple power of the National Legislature is "to prescribe an uniform rule of naturalization, and the "exercise of this power exhausts it, so far as respects the "individual." <sup>2</sup>

In the passage of the Act of 1855, Congress strictly observed this power, and confined its legislation and restricted the terms of the Act to alien-born women who might become naturalized on marrying an American citizen. The spirit and the language of the Act is limited and confined solely to foreigners becoming American citizens, and to this extent alone is it law. Congress could not constitutionally legislate in the terms of the British Act,

<sup>1</sup> 169 U.S. 703.

<sup>2</sup> 9 Wheat. 730, 827.

or, following the language of the Civil code as adopted by most Continental nations, extend it to "all women." Congress has no power to pass such legislation; and the native-born American woman marrying an alien must therefore seek her denationalization in some act other and additional to the mere fact of her marriage. Her marriage alone does not change and cannot change under the Constitution—and under the powers of Congress under the Constitution—her American allegiance. That allegiance can only be forfeited when married in the same manner that it could be forfeited when she was unmarried. Her status is not changed nor her national character altered by the assumption of a foreign-born husband; after wedlock she still remains an American citizen as before; and it requires some other act on her part manifesting an intention to abandon her American allegiance, such, for instance, as the actual leaving the shores of her native land and following her husband to his foreign abode, in order to affect a change of citizenship.

The United States Constitution provides that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

A native-born woman, therefore, is an American citizen.

This citizenship, acquired by birth within the United States, can, however, be lost by the person renouncing it after coming of age and becoming a citizen of another country.

But this is a matter entirely outside of any statute, and is a fact to be determined by the acts of the person, and whether or not they constitute an abandonment of allegiance. These facts would be:—

1. An actual change of domicil and permanent residence in another country:
2. An avowed intention to abandon one's native country

and become a citizen of another; or any public act from which such intention can naturally be inferred.

This being the law of the United States, one can well understand the amazement with which American women beheld the passage by the Congress of an Act providing that "any American woman who marries a foreigner shall take the nationality of her husband." This Act received the approval of the President on March 2, 1907. As already shown, it has been the law for many years that a foreign woman marrying an American citizen became of his nationality. No question can be raised as to the power of Congress to pass such a law. The present law, however, denationalizes American-born women. It denationalizes them *ipso facto* by virtue of the marriage ceremony itself, separate from any other act on the part of the woman manifesting her intention to abdicate her inherent right of American citizenship. The law expatriates her without her consent. The right of expatriation is one of the precious immunities of personal liberty. It is a personal benefit, a personal privilege which the individual alone can exercise, and it is a right of which the State cannot deprive a citizen. It is a right which the Congress of the United States itself has set its solemn commendation upon by an unqualified approval. Congress in 1868 declared that the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; therefore, any declaration, instruction, order or decision, of any official of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental privileges of the Republic.

In view of this solemn declaration by Congress, it is difficult to understand how Congress should have passed



a law depriving American citizens against their will of their natural and inherent right of expatriation.

While Congress is supposed to be the law-making power, yet, however, it must fortunately defer its judgment to another authority—the judicial power—vested in the Supreme Court of the United States.

This law is in direct conflict with the Constitution. It is in direct conflict with the judgments of the Supreme Court of the United States interpreting the Constitution, and should it come up for review before that Court will undoubtedly be so held. It is difficult to understand how the passage of such an unconstitutional law should have been allowed to escape the vigilance of the law-maker, and the keen scrutiny of the executive departments of Government which embrace some of the ablest lawyers of the land.

C. A. HERESHOFF BARTLETT.

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#### IV.—THE BAR IN THE UNITED STATES.

**A**MONGST all the Bars, ancient, mediæval and modern, the Bar of the United States stands out pre-eminently as having been throughout the whole of its career the organisation of a profession whose members belonged to and spoke for the mass of the people. The Bar of Rome, in the days of its most brilliant fame, was largely a body, if not in origin and status at least in social order, of patricians, who in the course of their struggle for political ascendancy, and for the acquisition of the great offices of State, gained rhetorical aptitude, popular acceptance, and widespread influence, by advocating the causes of clients who were, in many instances, rather retainers than retaining. The Courts were intellectual wrestling grounds, they were popular theatres, they were arenas, where private strifes and public

quarrels were openly waged, apart from things in dispute or wrongs in remedy. Several things are obvious to one broadly surveying the litigations of those times—that the parties to the suits were often in reality groups, factions, families, communities; that the formal parties to the suits were often shades and nominees; and that the ostensible causes of judicial decision were often fictions and cloaks for ulterior purposes. Those brilliant men who were at the head of the Bar of Rome were forensic gladiators seeking opportunity for display, for exercise, and for personal rivalry, yet ever mindful of the advance of their own interests, personal, social, political, family, patronic, partisan. Hence a Bar of striking personalities, and an order without much corporate cohesion, but with very great influence on public affairs. Now the Bar in France, and I take as an illustration the Bar of Paris, is the best example of a powerful, mediæval, professional organisation. It was closely attached and even allied to the fortunes of the *Parlement* or Supreme Court. It may be said to have consisted of a body of men enjoying a considerable measure of Court favour, in exchange for a very valuable and at times essential support to that system of internal administration which fluctuated between a benevolent and a malignant despotism. There was no opportunity for a free political career. Preferment, judicial office, diplomatic employment, even the countenance of the Court, largely depended, not in any way upon popular favour, but upon the appreciation of the royal *entourage* in the first place, and the retention of its approbation in the second. Hence a Bar of close structural grain, almost a petty nobility, whose members were learned subtle courtiers, with occasional outbursts of corporate independence when the privileges of their order were threatened, and some flashes of personal eloquence when pent-up forces broke their barriers in periods of public excitement, or in the throes of some great dramatic struggle

which waged itself in the tribunals. In England a description of the history and the tendencies of the Bar may for the purpose of comparison be borrowed from that passage in *The American Commonwealth* where our present ambassador to the United States sets side by side the two Bars of the Anglo-Saxons. "No English institution is more "curiously and distinctively English than this body with "its venerable traditions, its aristocratic sympathies, its "strong though now declining corporate spirit, its affinity "for certain forms of literature, its singular relation . . . to "the solicitors, its friendly control over its official superiors "—the judges." Only one observation on this passage in passing—the decline of the corporate spirit in the branch which includes the Bar of England is coincident with the immeasurable increase of the spirit of confraternity in the branch which includes the solicitors in England.

Now the Bar of the United States—or rather the Bars in the different States of the Union—has had a very remarkable career which, whilst it recalls some features of each of the organisations of Rome, of France and of England, differs from each and all of them in some of its most singular aspects. Considered as State organisations they approximate to those local Bars in France, of which the Bar of Paris stood first, and of which the Bar of Paris may be taken as an example. They are entirely separate from each other, they do not form part of the State machinery of Government, they tend towards a community of practice and of ethics, whilst preserving their corporate isolation or at any rate insulation. In other words, they are distributed into separate jurisdictions by the sharp lines of State frontiers. Amongst the causes of original divergence were the diverse and even antagonistic origins of the States, the different systems of local law which were therein administered, and the natural strivings to retain and maintain that State independence which jealousy may

seek to assert long after material advantage may point to effacement. Now the course of a hundred years has at any rate sufficed, not to destroy the divisions, but to create an association which to a large extent has over-ridden the consequences of those divisions. There is the substance, and to a certain extent the frame, of a Corporate Bar of the United States in the American Bar Association. Amongst the causes of ultimate solidarity which approximated towards the system of the Bar of England, were the Federal system of Supreme Judicature enjoined by the Constitution of the United States, the original adoption in its essence and the gradual recognition of the development of the Common law of England, and recently the successive gatherings of delegates from every part of the United States in the Annual Meetings of the Bar Association. Thus the mediæval system—for there was not only a likeness, but a like cause for the separation, that is to say, the planting of organisations having a common ancestor (in the case of France, Rome; in the case of the United States, England); over sparsely populated and severed parts of a large country—has given way to the modern system, with its constant inter-communication, and consequent fusion by a compromise of divergencies.

But before dealing with the actual details of the history of the Bar in the United States, it will be necessary to point out a significant difference in its career, both in comparison with that in France and with that of England. In France the *Barreau de Paris*, closely allied with the *Parlement*, was part of the absolute administrative system which it protected, which it enforced, which it regulated, and which it even made for a long period tolerable. In England the Bar, closely allied with the Bench (if one may exclude equally the periods of the actual servility of both, and of the stern and dignified resistance of both, towards the exercise of the power of the Crown), contented itself with recording

and registering, and but rarely influencing or directing, and never raising or stirring the great waves of national progress. They most excellently drafted a document affirming the decision of the people, and precedent was not disregarded, and dangers of misconstruction were not unforeseen, for the Bar acted as family solicitor to the nation.

But with the Bar of the United States it is different. It would be difficult, nay impossible, to find in the history of civilised States—ancient, mediæval, modern—an organisation neither directly political nor directly social, but merely professional, which, within the small compass of a life of little more than a hundred years, has had so much influence both corporate and individual on the fate and fortune, on the birth, the progress and the development to maturity of a nation, as the Bar of the United States. I write with the whole of history unrolled. There are only two parallels within purview which afford an approach; first, the influence of the Trade Guilds in the formation of the towns, and secondly the influence of the Clergy in the formation of the States of the Middle Ages. In each case you find the power of a class, and the power of distinguished members of that class, confronting elements of disorder, both external and internal, holding the destructive forces of foreign hostility at bay, in order to foster internal development; and the disintegrating forces of domestic strife in check in order to prevent external weakness. I take one illustration from those times—I take the influence of the clerics in shaping and directing the political, the legal, the diplomatic, and the social system of England during the Plantagenet period. They were the educated, the highly trained, the most accepted, the trusted class in the community, the repositories of learning, the guardians of the archives, the stillers of the tempest, the organisers of the victory of the way of order through the rough field of

medieval disorder. Whilst the reign of law and the rule of social peace were being evolved, theirs was the continuity of pressure towards a standard of public safety and private security. So, in the evolution of the American Constitution at the making of the American nation, and towards the dawning of the day of American literature, the great lawyer class in the United States, and the great lawyers of that class, were predominant in their influence at every step of national progress. Just as Lanfranc and Anselm, and A'Becket and Langton and Arundel, were the forerunners and pioneers of the administrative unity, the legal system, the theory of the constitution, and the national force of England, so Adams and Jefferson and Madison and Hamilton were the founders and the guardians (in so far as the whole American people were not the founders and the guardians) of executive order, of constitutional freedom and of national unity.

To show the height and the depth of this power within the limits of a single article is not easy, but I select a few landmarks on the long road of American progress.

The extent to which the Revolution in America was a Revolution based on legality at every step, is difficult for England to appreciate. In February, 1761, the chief justice and his four brethren sat in the crowded council chamber of the old town house in Boston (which still to-day bears the escutcheon of the Lion and the Unicorn), to hear arguments on the question whether those employed to enforce the recent acts relating to trade had power to demand by writs of assistance the help of the Executive officers of the Colony. It was agreed that to deny the writ was to reject the position that "the Parliament of Great Britain is the Sovereign "Legislator of the British Empire." James Otis, 'the great incendiary of New England,' stands forth: "I am determined" said he, "to sacrifice estate, ease, health, applause, "and even life, to the sacred calls of my country, in oppo-

"sition to a kind of power the exercise of which cost one King of England his head and another his throne. These writs are the worst instrument of arbitrary power, the most destructive of the fundamental principles of law."

It is December of 1763. A great business is on foot in the Court House of Virginia. Tobacco was the legalised currency of that colony. In 1758, a year of distress, the Legislature allowed the people the alternative of paying their public dues (including the dues to the established clergy) in money, at the fixed rate of twopence for the pound of tobacco. All but the clergy acquiesced in the law. The ratification of the law was opposed by the Bishop of London who, with a sagacious shiver at the coming storm, remarked on "the great change in the temper of the people of Virginia in the compass of a few years, and the diminution of the prerogative of the Crown." The "Twopenny Act" became therefore null and void from the beginning. The trial is to inquire by a jury into the amount of damages which the "parsons" have sustained. The contract in question was for payment of sixteen thousand pounds of tobacco; the Act of 1758 had fixed the value at twopence a pound. In 1759 it had been worth twice that sum. "A king," said Patrick Henry, "who annuls or disallows laws of so salutary a nature, from being the father of his people degenerates into a tyrant, and forfeits all right to obedience." "The gentleman has spoken treason," said the Counsel for the Crown. The cause had involved the dues of the clergy. Patrick Henry had made it the battleground of the rights of the people of America. The jury returned a verdict of a penny damages. The throng gathered in triumph round their champion. "The crime of which Henry is guilty," wrote one of the clergy, "is little (if any) inferior to that which brought Simon Lord Lovat to the block." But he lived, not only to advance the freedom of his fellow citizens, but to chide

with poignant phrases those who were "lukewarm in the abolition of slavery."

It is the 1st July, 1776. "That these united colonies are, "and of right ought to be, free and independent States; "that they are absolved from all allegiance to the British "Crown; and that all political connexion between them "and the State of Great Britain is and ought to be totally "dissolved."

The eyes of everyone in the assembly which was to debate that momentous resolution turned to John Adams of Worcester, that lawyer who not inaptly has been called the Martin Luther of the American Revolution. Bancroft narrates "Of his sudden, impetuous, unpremeditated speech, "no minutes ever existed and no report was made. It is "only remembered that he set forth the justice and the "necessity, the seasonableness and the advantages, of a "separation from Great Britain; he dwelt on the neglect "and insult with which their petitions had been treated "by the king, and that independence had become the "first wish and the last instruction of the communities "they represented." And a single day might have brought the British army before New York.

By that resolution the thirteen British Colonies had become thirteen independent States. From the fulness of his own mind Thomas Jefferson, that famous lawyer of Virginia, drafted that declaration which was at the same time an Indictment of the Rule of Great Britain and an assertion of the rights of the American people. That immortal State-paper has been well termed "the genuine effusion of the "soul of the country at that time . . . so that the astonished nations, as they read that all men are created equal, "started out of their lethargy like those who have been "exiles from childhood when they suddenly hear the dimly "remembered accents of their mother tongue."

Alexander Hamilton, of New York, and James Madison,



of Virginia, the never-failing champions of the Federal Supremacy of Congress, were the lawyers who hammered into shape the American Constitution.

It would be impossible to fully enumerate within the limits of this article the bead-roll of eminent lawyers whose careers were during the ensuing fifty years identified with the expanding national force of the United States. History records the very highest examples of their employment, not only in the distinguished offices of every State, but in the great offices of the Federal Government, and not only in the highest of internal employments, but in the most valued spheres of foreign representation during the period of the expansion of the United States. Strange irony of fate that, alone among the nations, it must be said that the Judicial Bench, for some periods and in some localities, fell far short of the high eminence of the Bars. That failure of the past, for which the present has no analogue, is largely due to the fact that judicial preferment was a matter of public election, and not a matter of professional advancement.

At the present day, in Congress and in the State legislatures, a very large proportion of lawyers are enrolled. It is, however, obvious that their control over the political destinies of the Republic has passed to other hands. An aristocracy of wealth has succeeded an aristocracy of intellect. The magnates who control markets have succeeded the advocates who swayed the Public Forum and the Public Assembly. And even political leaders are powerless in the grasp of political parties, which are themselves in the grasp of political organisers. The Party Machine, in so far as it has permitted the evolution of the power of personalities, has granted that power to the members of a particular profession which the system of politics by party has called into activity. The demand for the Constitutional lawyer, in the sense of a lawyer of Constitutional importance, has been brought to a

very small degree. Equally, the social value of the lawyer and of the profession, though positively as high as ever, has become comparatively of smaller weight. Equally with the countries of the Old World, the potency, as a social factor of the financial class and of any member of that class, has been immensely enhanced. Side by side with the elevation of the metallic classes, which has by gravitation displaced the professions from social pre-eminence, there has been a collateral process of intellectual diffusion which has, by the spread and adoption of educational facilities, legitimately created a large society of value coincident to that of the professional classes.

The State services of the lawyers of the future will not be extended, save in instances to secretarial departments, which will be more and more administered by administrators trained for that purpose. The diplomatic service will tend to become more the province of a leisured grade analogous to the diplomatic service of Great Britain. In the meantime the importance of the profession, and their opportunities for wealth and advancement, are being increased and extended by (a) their employment as advisers to, and advocates for, the Railroad interests and Industrial Trusts; (b) their legitimate occupation as representatives of the Government before the Tribunals of the State and of the Federation; and (c) the complete control of the avenues and approaches to the Judicial Bench, which (curious and unique result of the passion for popular control), for so long a period of the dominance of the untrained product of popular folly or corruption, was the despair of the citizens and the wonder of the critics of the United States.

If one need to ask for the reasons of its wonderful influence over the fashioning of the State and of society during the fifty years of its supremacy, one might point to the causes for the pre-eminence of the Bar of Republican Rome during the hundred years of its power. A nation in the making under the eyes of the civilised world without the

preliminary stages of immature civilisation, a constitution rigid in power and yet in substance in the flux, the agglomeration of divergent populations, the inter-independence of component parts, and the vibration of society seeking its centre of gravity. To these must be added the absence of an assured aristocracy and the constant presence of complex problems of State. Guidance of trained minds was demanded, and such guidance was amply supplied. The Constitution was consolidated, the machine was completed; it has been tried by the test of indefinite expansion—it has amply stood the test: it was tried by the fire of the greatest Civil War of modern times—it has come through purified, strengthened. The weapon has been forged, and tempered, and tried—it has been found true and sufficient. Further, the United States has attained a position of such preponderating influence, that it may be termed the balance-holder in the Councils of the World. Save in the sphere of International law, the lawyer, save as a lawyer, has ceased to be a necessary part of the instrument of State; and with his decline as a personal power, has arisen the corporate power of his order.

Such being the broad general outlines of the history of the Bar of the United States as a national asset, it will be of value to follow the lines of its development, so as to account for those professional features which are singular. We have indicated that the first phenomenon which to England appears remarkable, is the existence for a considerable period, side by side, of a number of organisations or quasi-organisations—distinct, separate, isolated—corresponding with the divisions of the different States of the Union. Now, it will be recalled that the States were founded at different times for different causes, and with populations very divergent in customs, habits, and trends of thought and action. We may, for the purpose of analysis, take as types of the colonies founded by the English,

examples in the following groups:—(a) Colonies deliberately brought into existence with the countenance of the home government, partly with the design of planting permanent fields of energy for the enterprising, partly as a relief for a population overgrown in England, by reason of the then imperfect development of industrial pursuits, partly as a method of the extension of English dominions in order to counter-balance the possessions abroad of Spain and France. Hence, for example, the ample patent signed by James I, “to deduce a colony into Virginia”; (b) Then these new colonies which were in the main established in the spirit of broad religious toleration, such as Maryland, where Roman Catholics oppressed by the laws of England might be protected from Protestant bigotry, and where equally Protestants of one form of faith might be protected from Protestants of another; (c) Colonies in the character of refuges for the Puritans or other the victims of State oppression, which in one form or another was largely the origin of the States of New England; and (d) Colonies which, like Pennsylvania, partook of all these characteristics in a greater or less degree. Now, in each of these colonies it must be obvious that when settled conditions prevailed and the need of trained lawyers arose, there would appear a local Bar with conditions varying, it is true, with each environment, but on the whole with a likeness to its lineal predecessor in England. When these colonies became States, these colonial associations of lawyers locally practising would become State Bars, and so they remain to this day. Hitherto we have spoken exclusively of the States having an English origin. The belt of territory round the Gulf of Mexico was the dominion of Spain; the tract in the vicinity of the Hudson River (which afterwards formed the State of New York) belonging to the Dutch; the Valley of the Mississippi was the centre of French influence. On the incorporation of each of these possessions, to some extent the customs and

municipal institutions of those surrendering had to be guaranteed, and these divergencies, thus created, have not altogether been effaced even during the century of Federal government. Lastly, there are the States which have been formed since the Union, in which in many instances local customs have been perpetuated.

Now there would, in the creation of these centres of professional activity, of necessity be tendencies drawn from the change of environment. The Common law of England was from the beginning the basis of the law in each State. There would, however, be two modifications. The first would be through the natural tendency towards simplification of a population in permanent revolt against an antiquated system involving many mysterious ordinances. The memory of the Court of High Commission and of the Court of Star Chamber, of courtier advocates and of subservient judges, would not be speedily effaced from the minds of the descendants of the Pilgrim Fathers. The other modification would be the product of the new environment, which would make unnecessary many old world rules and make necessary many new regulations. It would be obvious that there would be very great divergencies between the Common law, as administered under the quasi-feudal rule of Maryland by Lord Baltimore, and the quasi-democratic system which would be approved by Roger Ludlow in a settlement on the Connecticut River. It is not surprising to find that where Colonial Bars should come into existence under the new auspices of these newly-peopled countries, the etiquette of the profession must be relaxed, and ancient usages treated as matter of antiquarian interest. Now, several things are noticeable regarding the members of the Bars in each of the States. One rule, which was never applied in any Colonial or State organization of lawyers, was that which we are accustomed to call in England the division between the two branches of the profession. Wide distances, sparse

populations, tendency towards simplification of procedure, contributed towards fusion of the profession from the start and throughout to this day. The division into the two departments of forensic advocacy and of business advice has never been known in the United States. The nearest approach which in modern times is to be found, is the extensive and extending formation of legal partnerships which goes far to prevent those difficulties which a breach of the English system might seem to create.

In no Colony was there, and in no State is there, any teaching, training, or examining body resembling an English Inn of Court, with the right of exercising disciplinary jurisdiction. In some few States, however, professional associations have succeeded in obtaining statutory recognition. In recent times the tendency towards this is marked. The State admits, the State excludes, and for certain serious offences ejects. Outside this what one may call voluntary associations, more in the nature of perpetual circuit messes, exercise a kind of general supervision over the conduct of the members of the profession locally attached. The result of the system is comparatively little corporate feeling and corporate action, although the custom, which of late has grown up of an annual congress of members of the Bars throughout the United States—and to this we will presently refer—will, in time, have a very powerful influence in bringing this corporate spirit into existence and activity. It must, I think, be conceded that the absence of any professional costume tends (as we English think) to diminish the individual and corporate status of the profession, but it must be remembered that uniform or official costume is almost alien to the general feeling of society throughout America, and indeed, official costume, to be of real value, must always be a survival of a former age. It is an historical sign rather than a hall-mark.

In most States the Courts impose an examination on

persons seeking to be admitted to practice at the Bar. In some States, there is a requirement that the candidate shall have for some time read in a lawyer's office. It is, however, apparent to anyone who comes much in contact with the American lawyer, that he is on the whole in the average better equipped than his English compeer for the pursuit of his profession. This is not merely due to the higher intellectual average of the American citizen of every grade, which is undoubted, but to the excellent law schools in many American Universities.

Increasing attention is paid to the collateral study of Roman law and International law. The great knowledge of American lawyers of the principles of International law which, undoubtedly, compares favourably with the extent of familiarity with it which exists in England, is not so much due to a difference in the school system as to these considerations. The United States stands in a unique position in the States of the world, in relation to matters of public International law, evolving and being powerful enough to assert strong individual opinions, having regard to its own peculiar position as a volcanic eruption in the circle of great nations. The proximity of numerous States having conflicting systems of law, has quickened the appreciation of the lawyers throughout the country regarding the problems of private International law. The conflict of laws is a matter of constant existence and a problem of frequent occurrence.

Amongst the most noticeable of the features of the American system of legal education is the custom of "mooting" amongst the students, a custom which, with the exception of the revival at Gray's Inn, has completely fallen into desuetude as an instrument of forensic training in England. In the Conference of the American Bar Association of 1899, held at Buffalo, U.S.A., the writer was present at a discussion which followed a paper read by

the present Mr. Justice Walton on the System of Mooting as part of a student's education. This ancient system, abandoned in England, has really been carried to the United States by the lawyers who originally settled there, and has survived as a living force the period during which the lassitude of legal education in England has allowed it to vanish as part of the students' curriculum.

Whilst on the subject of legal examinations, it may not be without interest to record the antiquity of the system of scrutiny for personal fitness.

"*Les juges*," said the ancient chronicler of the Courts of France (year 1402), "*ne reçoivent avocat à serment d'avocasser que premièrement ils soient examinés suffisamment si à ce est idoine avant toute œuvre afin que le peuple ne soit mis dans les mains d'un avocat qui rien ne fasse à sa cause.*"

Before we proceed to set forth the rules which govern in the United States questions of Professional Ethics, the following matters should be noted.

With rare exceptions a Counsel can bring an action for the recovery of his fees, and as a matter of collateral obligation can be sued for negligence.

Though the Bars of the States are separate institutions (as in France rather than in England), and although there is no national organisation of the Bar throughout the States, yet every member of the Bar can practice as of right in any Federal Court, and can practice as of courtesy in the Courts of any State. It will be remembered that however the State laws may approximate in theory, a different system prevails, and in fact many important peculiarities of law and its administration exist in each State.

One striking peculiarity to the eyes of England is the administration of the oath to every advocate, containing the subscription to the main canons of professional practice. A form will be found set out in the course of this article of that which is imposed on the State of Washington, but it



differs in its essential features very little from that in force in any other State. If its origin be traced, it will be found to have been adopted from the form of oath prescribed from time long past to the advocates of Geneva, Switzerland. As a matter of historical sequence it is strange how, step by step, the regulations which are imposed on the Bar of the Greatest Republic of modern times, can in each instance be placed parallel with some similar ordinance promulgated by the Kings of France to the Bar of Paris.

The open character of the profession naturally obviates many rules of etiquette which are incumbent on the lawyer in England. It is not unprofessional for a Counsel to advertise himself in the newspapers. He is allowed to make whatever bargain he pleases with his client. It seems that he may make an agreement to be paid for his work by way of commission on the result of a suit.

It may be said that the government of the Bar in any State is partly statutory, of the State; partly domestic, of the Order. There also exists the further sanction of the official opinion of the local association and the collective opinion of the American Bar Association.

The recent Report of the Committee on Code of Professional Ethics, presented to the American Bar Association at Portland, Maine, in August of 1907, is of double value. It shows the point to which the American Bar has already reached. It indicates the standard which they propose to adopt for the future guidance of the Profession. It is of too much importance to reduce to a summary, and the text in its main outlines is therefore subjoined :—

I. The subject of professional ethics is receiving widespread attention throughout the nation. Codes of ethics have already been adopted by the Bar Associations of the following States :—Alabama, December 14, 1887; Georgia, May 9, 1889; Virginia, July 24, 1889; Michigan, June, 1897; Colorado, July 6, 1898; North Carolina, June 28, 1900; Wisconsin, February 13, 1901; West Virginia, February 12, 1902; Maryland, July 2, 1902; Kentucky, July 2, 1903; Missouri, September 28, 1906.

In the State of Washington, seven brief but admirable canons have been inserted in the oath to be administered on admission to the Bar, being the "duties" of an attorney and counsellor declared by the territorial statute of January 24, 1863, and later incorporated in the Washington Civil Code.

In Louisiana, there is incorporated in the 1899 charter of the State Bar Association a code of ethics consisting of eight canons, almost identical with those in the oath required by the laws of Geneva.

In Pennsylvania, the State Bar Association in 1906 appointed a committee "to take up, consider, and report upon the subject of a code of professional ethics." In July, 1907, the committee reported, *inter alia* :

"If your committee had entertained any previous doubt of the 'advisability and practicability' of the adoption of a code of professional ethics, such doubt was wholly dissipated when the report of the committee of the American Bar Association and its adoption by that Association were considered; and that report is hereto appended and adopted as our report upon those features of the resolution of our appointment.

The Pennsylvania Bar Association in approving the report of its committee extended "to the American Bar Association the assurance of the hearty sympathy and co-operation of this Association in the movement to establish and to maintain a higher ethical standard in the profession."

In Ohio, at the State Bar Association meeting in July, 1907, a committee was appointed to draft a code of ethics, and the Secretaries of State Bar Associations in many other States report an active interest in the subject in their respective jurisdictions.

II. Your committee are of opinion that the adoption of canons of professional ethics by the American Bar Association is destined to have a powerful and far-reaching influence upon the development of our profession, indeed to so great an extent that it will be difficult to overestimate the importance of the event. We believe that such canons, to become practically effective, should be adopted only after mature and careful deliberation, and much fuller consideration on the part of our membership than is possible at one of our annual meetings.

We accordingly annex an Appendix containing :

- A. That portion of the 1906 report of your committee, which deals with the "advisability and practicability" of the adoption of canons of professional ethics by this Association ;
- B. A compilation of the codes adopted in Alabama, Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, West Virginia, Wisconsin, and Virginia ;
- C. The eight canons incorporated in the 1899 charter of the Louisiana Bar Association ;
- D. The oath administered to lawyers on admission to the Bar in the State of Washington, containing a brief outline of professional duty ;
- E. The oath prescribed for advocates by the laws of Geneva ;
- F. The lawyer's prayer, written by Dr. Samuel Johnson, September 26, 1765 ;
- G. The ethical code for lawyers promulgated in 1683 by Christian V of Denmark and Norway ;
- H. Hoffman's *Resolutions in Regard to Professional Deportment*, published at Baltimore, Maryland, in 1836.

### III. We recommend :

*First.* That the committee be continued and enlarged by the addition of Judge Thomas Goode Jones, author of the Alabama code, which with but few alterations has been adopted by the Bar Associations of eleven States, also that Mr. Justice Brewer and the retiring and incoming Presidents of the Association be declared members of the committee, and also Hon. George R. Peck, who as President of this Association in 1905, appointed the initial committee on this subject.

*Fourth.* That the committee be directed to have the proposed canons of professional ethics drafted by May 1, 1908, and on or before that date to transmit a copy to each member of the Association, and to the respective State Bar Association committees, requesting suggestions and criticism, the final report of the committee to be ready for submission at the 1908 meeting.

It will not be without interest, both for the purpose of verifying the care with which that report has been prepared, and also with the object of showing the secure basis of the project, to set out the names of those mainly responsible for it :—

HENRY ST. GEORGE TUCKER, Virginia, JAMES G. JENKINS, Wisconsin, WILLIAM WIRT HOWE, Louisiana, FRANCIS LYNDE STETSON, New York, EZRA B. THAYER, Massachusetts, FRANKLIN FERRIS, Missouri, THOMAS H. HUBBARD, New York, FREDERICK V. BROWN, Minnesota, LUCIEN H. ALEXANDER, Pennsylvania.

I desire to acknowledge my own personal indebtedness to Cephas Brainerd of New York, and Professor Charles Noble Gregory, Dean of the Law Faculty, University of Iowa, for information embodied in this article.

The following compilation of the Canons of Ethics in State Bar Association Codes will afford a clear notion as to the main lines of agreement, the code in force in Alabama being taken as the dominant example.

#### DUTIES OF ATTORNEYS TO COURTS AND JUDICIAL OFFICERS.

1. *Respect for Judicial Officers.*—The respect enjoined by law for Courts and judicial officers is exacted for the sake of the office, and not for the individual who administers it. Bad opinion of the incumbent, however well founded, can not excuse the withholding of the respect due the office, while administering its functions.

2. *Criticisms of Judicial Conduct.*—The proprieties of the judicial station in a great measure disable the judge from defending himself against strictures upon his official conduct. For this reason, and because such criticisms tend to impair

public confidence in the administration of justice, attorneys should, as a rule, refrain from published criticism of judicial conduct, especially in reference to causes in which they have been of counsel, otherwise than in Courts of review, or when the conduct of a judge is necessarily involved in determining his removal from or continuance in office.

3. *Using Personal Influence on the Court.*—Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorneys to misconstructions and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial personal and official relations between Bench and Bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable.

4. *Defending the Courts against Popular Clamor.*—Courts and judicial officers, in the rightful exercise of their functions, should always receive the support and countenance of attorneys against unjust criticism and popular clamor; and it is an attorney's duty to give them his moral support in all proper ways, and particularly by setting a good example in his own person of obedience to law.

5. *Candor and Fairness.*—The utmost candor and fairness should characterize the dealings of attorneys with the Courts and with each other. Knowingly citing as authority an overruled case, or treating a repealed statute as in existence; knowingly misquoting the language of a decision or text-book; knowingly misquoting the contents of a paper, the testimony of a witness, or the language or argument of opposite counsel; offering evidence which it is known the Court must reject as illegal, to get it before the jury, under the guise of arguing its admissibility; and all kindred practices are deceptions and evasions unworthy of attorneys.

Purposely concealing or withholding in the opening argument, positions intended finally to be relied on, in order that opposite counsel may not discuss them, is unprofessional. Courts and juries look with disfavor on such practices, and are quick to suspect the weakness of the cause which has need to resort to them.

In the argument of demurrers, admission of evidence, and other questions of law, counsel should carefully refrain from "side-bar" remarks and sparring discourse, to influence the jury or bystanders. Personal colloquies between counsel tend to delay and promote unseemly wrangling, and ought to be discouraged.

6. Attorneys owe to the Courts and the public whose business the Courts transact, as well as to their own clients, to be punctual in attendance on their causes; and whenever an attorney is late he should apologize or explain his absence.

7. *Display of Temper.*—One side must always lose the cause; and it is not wise or respectful to the Court, for attorneys to display temper because of an adverse ruling.

#### DUTIES OF ATTORNEYS TO EACH OTHER, TO CLIENTS AND THE PUBLIC.

8. It is a mark of proper respect, and a practice worthy of adoption in all Courts of record, for attorneys to rise and remain standing, while the judges enter and take their seats upon the Bench.

9. *Upholding the Dignity of the Profession.*—An attorney should strive at all times, to uphold the honor, maintain the dignity, and promote the usefulness of the profession; for it is so interwoven with the administration of justice that whatever redounds to the good of one advances the other; and the attorney thus discharges, not merely an obligation to his brothers, but a high duty to the State and his fellow-man.

10. *Disparaging Members of the Profession.*—An attorney should not speak slightly or disparagingly of his profession, or pander in any way to unjust prejudices against it; and he should scrupulously refrain at all times, and in all relations of life, from availing himself of any prejudice or popular misconception against lawyers, in order to carry a point against a brother attorney.

11. *How far an Attorney may go in Supporting a Client's Cause.*—Nothing has been more potential in creating and pandering to popular prejudice against lawyers as a class, and in withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause.

An attorney "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability," to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of this duty. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake.

12. *Exposing Corrupt Attorneys.*—Attorneys should fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession; and there should never be any hesitancy in accepting employment against an attorney who has wronged his client.

13. *Attitude of State's Attorney towards Innocent Prisoner.*—An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, forswears himself. The State's attorney is criminal, if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle prosequi*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.

14. *Defending One whom Advocate believes to be Guilty.*—An attorney cannot reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and honorable means to present such defenses as the law of the land permits, to the end that no one may be deprived of life or liberty, but by due process of law.

15. *Maintaining Harassing Litigation.*—An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

16. It is bad practice for an attorney to communicate or argue privately with the judge as to the merits of his cause.

17. He should avoid all unnecessary communication with jurors, even as to matters foreign to the cause, both before and during the trial.

18. *General Rules as to Professional and Unprofessional Advertising.*—Newspaper advertisements, circulars, and business cards, tendering professional services to the general public are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisement for business, by furnishing or inspiring editorials or press notices, regarding causes in which the attorney takes part, the manner in which they are conducted, the importance of his positions, the magnitude of the interests involved, and all other like self-laudation, is of evil tendency, and wholly unprofessional.

19. *Newspaper Discussion of Pending Litigation.*—Newspaper publications by an attorney as to the merits of pending or anticipated litigation, call forth discussion and reply from the opposite party, tend to prevent a fair trial in the Courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications; and when proper, it is unprofessional to make them anonymously.

20. It is better that all newspaper reports be taken from the records and papers on file in the Court.

21. *Where Attorney becomes Witness for his Client.*—When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to other counsel. Except when essential to the ends of justice, an attorney should scrupulously avoid testifying in court in behalf of his client, as to any matter.

22. *Impersonality of the Advocate.*—The same reasons which make it improper in general for an attorney to testify for his client, apply with greater force to assertions, sometimes made by counsel in argument, of personal belief in the client's innocence or the justice of his cause. If such assertions are habitually made they lose all force and subject the attorney to falsehoods; while the failure to make them in particular cases will often be esteemed a tacit admission of belief of the client's guilt, or the weakness of his cause.

23. *Stirring up Litigation.*—It is indecent to hunt up defects in titles and the like and inform thereof, in order to be employed to bring suit; or to seek out a person supposed to have a cause of action and endeavor to get a fee to litigate about it. Except where ties of blood, relationship or trust, make it an attorney's duty, it is unprofessional to volunteer advice to bring a lawsuit. Stirring up strife and litigation is forbidden by law, and disreputable in morals.

24. *Confidential Communications.*—Communications and confidences between client and attorney are the property and secrets of the client, and can not be

divulged except at his instance ; even the death of the client does not absolve the attorney from his obligation of secrecy.

25. *Accepting Adverse Retainers.*—The duty not to divulge the secrets of clients extends further than mere silence by the attorney, and forbids accepting retainers or employment afterwards from others involving the client's interests, in the matters about which the confidence was reposed. When the secrets or confidence of a former client may be availed of or be material, in a subsequent suit, as the basis of any judgment which may injuriously affect his rights, the attorney cannot appear in such cause, without the consent of his former client.

26. *Attacking his own Instruments or Conveyances.*—An attorney can never attack an instrument or paper drawn by him for any infirmity apparent on its face ; nor for any other cause where confidence has been reposed as to the facts concerning it. Where the attorney acted as a mere conveyancer, and was not consulted as to the facts, and unknown to him, the transaction amounted to a violation of the criminal laws, he may assail it on that ground, in suits between third persons, or between parties to the instrument and strangers.

27. *What Influences an Attorney May Use.*—An attorney openly, and in his true character, may render purely professional service before committees, regarding proposed legislation, and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the Courts ; but it is immoral and illegal for an attorney so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

28. *Representing Conflicting Interests.*—An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts. Even then such a position is embarrassing, and ought to be avoided. An attorney represents conflicting interests within the meaning of this rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

29. "It is not a desirable professional reputation to live and die with—that of a rough tongue, which makes a man to be sought out and retained to gratify the malevolent feeling of a suitor, in hearing the other side well lashed and vilified."

30. *Ministering to Prejudices of his Client.*—An attorney is under no obligation to minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client can not be made the keeper of the attorney's conscience in professional matters. He cannot demand as of right that his attorney shall abuse the opposite party or indulge in offensive personalities. The attorney, under the solemnity of his oath, must determine for himself whether such a course is essential to the ends of justice and therefore justifiable.

31. *Ill-feeling and Personalities between Advocates.*—Clients and not their attorneys are the litigants ; and whatever may be the ill-feeling existing between clients, it is unprofessional for attorneys to partake of it in their conduct and demeanor to each other, or to suitors in the case.

32. In the conduct of litigation and the trial of causes, the attorneys should try the merits of the cause, and not try each other. It is not proper to allude to, or comment upon, the personal history, or mental or physical peculiarities or idiosyncracies of opposite counsel. Personalities should always be avoided, and the utmost courtesy always extended to an honorable opponent.

33. *Right of Attorney to Control the Incidental Matters of the Trial.*—As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite attorney to trial when he is under affliction or bereavement; forcing the trial on a particular day to the serious injury of the opposite attorney, when no harm will result from a trial at a different time; the time allowed for signing a bill of exceptions, cross interrogatories, and the like; the attorney must be allowed to judge. No client has a right to demand that his attorney shall be illiberal in such matters, or that he should do anything therein repugnant to his own sense of honor and propriety; and if such a course is insisted on, the attorney should retire from the cause.

34. Where an attorney has more than one regular client, the oldest client in the absence of some agreement should have the preference of retaining the attorney, as against his other clients in litigation between them.

35. *Making Bold Assurances to Clients.*—The miscarriages to which justice is subject, and the uncertainty of predicting results, admonish attorneys to beware of bold and confident assurances to clients, especially where the employment depends upon the assurance, and the case is not plain.

36. *Promptness and Punctuality.*—Prompt preparation for trial, punctuality in answering letters and keeping engagements, are due from an attorney to his client, and do much to strengthen their confidence and friendship.

37. *Disclosing Adverse Influences.*—An attorney is in honor bound to disclose to the client at the time of retainer, all the circumstances of his relation to the parties, or interest or connection with the controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligations or relations to the opposite parties will hinder or seriously embarrass the full and fearless discharge of all his duties.

38. *Expressing a Candid Opinion as to the Merits of a Client's Cause.*—An attorney should endeavor to obtain full knowledge of his client's cause before advising him, and is bound to give him a candid opinion of the merits and probable result of his cause. When the controversy will admit of it, he ought to seek to adjust it without litigation, if practicable.

39. Where an attorney, during the existence of a relation, has lawfully made an agreement which binds his client, he can not honorably refuse to give the opposite party evidence of the agreement, because of his subsequent discharge or instructions to that effect by his former client.

40. *Dealing with Trust Property.*—Money or other trust property coming into the possession of the attorney should be promptly reported, and never commingled



with his private property or used by him, except with the client's knowledge and consent.

41. *Business Dealings with the Clients.*—Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from haggaining about the subject matter of their litigation, so long as the relation of attorney and client continues.

42. Natural solicitude of clients often prompts them to offer assistance of additional counsel. This should not be met, as it sometimes is, as evidence of want of confidence; but after advising frankly with the client, it should be left to his determination.

43. *Keeping Agreements with the Client.*—Important agreements, affecting the rights of clients, should, as far as possible, be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made, because not reduced to writing, as required by rules of Court.

44. An attorney should use his best efforts to prevent his clients from doing those things which the attorney himself will not do, particularly with reference to their conduct towards Courts, officers, jurors, witnesses and suitors.

45. *Taking Advantage of Opposite Counsel without Notice to Him.*—An attorney should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving opposing counsel timely notice.

46. An attorney should not attempt to compromise with the opposite party, without notifying his attorney, if practicable.

47. In any matter, controversy or action, where the opposite parties are represented by attorneys, the attorneys of the respective parties shall confer and negotiate with each other and not with the clients.

48. When attorneys jointly associated in a cause can not agree as to any matter vital to the interest of the client, the course to be pursued should be left to his determination. The client's decision should be cheerfully acquiesced in unless the nature of the difference makes it impracticable for the attorney to co-operate heartily and effectively; in which event, it is his duty to be asked to be discharged.

49. *When Association with Other Attorneys is Objectionable.*—An attorney coming into a cause in which others are employed, should give notice as soon as practicable, and ask for a conference, and if the association is objectionable to the attorney already in the cause, the other attorney should decline to take part, unless the first attorney is relieved.

50. When an attorney has been employed in a cause, no other attorney should accept employment as his associate, without previously ascertaining that his employment is agreeable to the attorney first employed.

51. An attorney ought not to engage in discussion or arguments about the merits of the case with the opposite party, without notice to his attorney.

52. *Explicit Understanding as to Compensation.*—Satisfactory relations between attorney and client are best preserved by a frank and explicit understanding at the outset, as to the amount of the attorney's compensation ; and where it is possible this should always be agreed on in advance.

53. *Suing a Client for a Fee.*—In general it is better to yield something to a client's dissatisfaction at the amount of the fee, though the sum be reasonable, than to engage in a law suit to justify it, which ought always to be avoided, except as a last resort to prevent imposition or fraud.

54. *Fixing the Amount of the Fee.*—Men, as a rule, overestimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth ; though his poverty may require a less charge in many instances, and sometimes none at all.

55. An attorney may charge a regular client, who entrusts him with all his business, less for a particular service than he would charge a casual client for like services. The element of uncertainty of compensation where a contingent fee is agreed on, justifies higher charges than where compensation is assured.

56. *Elements to be considered in Fixing the Fee.*—In fixing fees the following elements should be considered : 1st. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. 2nd. Whether the particular case will debar the attorney's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed ; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. 3rd. The customary charges of the Bar for similar services. 4th. The real amount involved and the benefits resulting from the services. 5th. Whether the compensation be contingent or assured. 6th. Is the client a regular one, retaining the attorney in all his business ? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth ; and in fixing the amount it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

57. *Contingent Fees.*—Contingent fees may be contracted for ; but they lead to many abuses, and certain compensation is to be preferred.

58. *Compensation for Services rendered to Another Attorney.*—Casual and slight services should be rendered without charge by one attorney to another in his personal cause ; but when the service goes beyond this, an attorney may be charged as other clients. Ordinary advice and services to the family of a deceased attorney should be rendered without charge in most instances ; and where the circumstances make it proper to charge, the fees should generally be less than in cases of other clients.

59. *Treatment of Witnesses and Parties to the Cause.*—Witnesses and suitors should be treated with fairness and kindness. When essential to the ends of

justice to arraign their conduct or testimony, it should be done without vilification or unnecessary harshness. Fierceness of manner and uncivil behavior can add nothing to the truthful dissection of a false witness' testimony and often rob deserved strictures of proper weight.

60. *Attitude toward Jury.*—It is the duty of the Court and its officers to provide for the comfort of jurors. Displaying special concern for their comfort, and volunteering to ask favors for them, while they are present—such as frequent motions to adjourn trials, or take a recess, solely on the ground of the jury's fatigue, or hunger, and uncomfortableness of their seats, or the Court room, and the like—should be avoided. Such intervention of attorneys, when proper, ought to be had privately with the Court, whereby there will be no appearance of fawning upon the jury, nor ground for ill-feeling of the jury towards the Court or opposite counsel, if such requests are denied. For like reasons, one attorney should never ask another in the presence of the jury, to consent to its discharge or dispersion; and when such a request is made by the Court, the attorneys, without indicating their preference, should ask to be heard after the jury withdraws.

61. All propositions from counsel to dispense with argument should be made and discussed out of the hearing of the jury.

62. Treating jurors after the rendition of a verdict in favor of one client is disreputable. All like practices are disreputable, and should be scrupulously avoided.

63. *Conversing privately with Jurors.*—An attorney ought never to converse privately with jurors about the case; and must avoid all unnecessary communication, even as to matters foreign to the cause, both before and during the trial. Any other course, no matter how blameless the attorney's motives, gives color to the imputing [of] evil designs and often leads to scandal in the administration of justice.

64. An attorney assigned as counsel for an indigent prisoner ought not to ask to be excused for any light cause, and should always be a friend to the defenceless and oppressed.

65. The lawyer should study the law with the constant purpose to do what he can to amend and perfect it.

66. Except upon the ground that a moral principle is involved, an attorney ought never to counsel or approve the infraction or evasion of a valid law. The fact that the end to be gained is a political one will not justify any departure from this rule.

67. While an attorney should speak respectfully of the judiciary and of all lawfully constituted authorities; and in the trial of causes and in all his dealings with the Court should demean himself towards it with deference and respect, he has, on the other hand, a right to expect and exact from the Court the same demeanor towards himself. It is unfortunate for the cause of justice when the judge forgets his dependence on the Bar and forgets to pay it the deference and respect which is its due.

68. The qualities desirable in a judge are courtesy, affability, even temper, patience, conscientiousness, legal learning, sound sense and judgment, the moral courage to meet an issue squarely, and an impartial mind.

69. The Bar should never permit political considerations to outweigh judicial fitness in selecting material for the Bench, and it should earnestly and actively protest against the appointment or election of those who, in the general estimation of the Bar, are unsuitable for the Bench.

70. The enumeration of the foregoing duties shall not be construed to deny the existence of other duties equally imperative, though not specifically mentioned herein.

Many, indeed most, of the foregoing rules have been adopted by one or other of the States. In some few instances the rules are those of a single State. For example, Rules 8 and 20 belong alone to Wisconsin, Rules 44 and 52 alone to Michigan, Rule 47 alone to North Carolina, and Rules 65 to 70 inclusive to Kentucky. Naturally, the tendency is towards unification. It must not be supposed that this code covers the whole range of the questions which from time to time have agitated the ethical field of the Bar of the United States, nor that the rules contained in that code have received universal acceptance. There are some who regard them as constituting a counsel of perfection, and others who regard them as leaving loopholes for future malpractices. Only one of the controversies aroused I propose to deal with, and that is the divergence of opinion regarding the right of a client to insist upon his retainer being accepted by an unwilling advocate. As to the English position in that regard, and the practice of the countries throughout Europe, reference may be forgiven to an article in the *Law Magazine and Review* (August, 1904), in which the whole question is dealt with at length. The ultimate opinion which has fluctuated between the view based upon English tradition and the view based upon the analogy between American and Continental conditions, seems to be best expressed by the recommendation to the American Bar Association of Mr. Thomas H. Hubbard,

a distinguished advocate of New York, to the following effect :—

“ Except under special circumstances, as when the Court assigns Counsel, no lawyer is obliged to act either as adviser or advocate for any person who may wish to be his client. He has the right to refuse retainers. It follows that every lawyer must decide what business he will accept as Counsellor, what cases he will bring into Court for plaintiffs, what cases he will conduct in Courts for defendants. It follows further, that the responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defences, is the lawyer's responsibility. He cannot escape it by urging, as an excuse, that he is only following his client's instructions.”

It is of interest and of value to sum up these rules of professional conduct by the recital of the Lawyer's Oath in the State of Washington, adapted from the Territorial Act of January 24, 1863.

1. I DO SOLEMNLY SWEAR that I will support the Constitution and laws of the State of Washington ;

2. That I will maintain the respect due to Courts of justice and judicial officers ;

3. That I will counsel and maintain such actions, proceedings, and defenses only, as appear to me legal and just ; except the defense of a person charged with a public offense ;

4. To employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of facts or law ;

5. That I will maintain inviolate the confidence and, at every peril to myself, preserve the secrets of my client ;

6. That I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged ;

7. That I will never reject, from any consideration personal to myself, the cause of the defenceless, or oppressed. SO HELP ME GOD.

We have said that the provisions of this oath can be traced to the ordinances imposed on the advocates of the Bar of France by the Kings of France, and the following excerpts will not be without interest, ranged in a list for the purposes of comparison. The first four are taken from the ordinance of Philip the Bold, of the 23rd October, 1274 :—

1. *Advocati initio anni jurabunt articulos qui sequuntur. In causis quas forebunt si viderint tangi regem ipsi de hoc curiam avisabunt.*

2. *Bene mane veniant et bene mane venire faciunt partes suas. Facta impertinentia non proponant. De curia non recedent quamdiu magistri in causa erunt.*

3. *Causarum injustarum patrocinium scientes non recipient—si non ab initio sed post factum tamen viderint eam esse injustam statui eam dimittent.*

4. *Consuetudines quas veras essi non crediderint non proponant neque sustinebunt. In eis delationes et subterfugia malitiosa non quærent.*

5. *Ne seront pour les deux parties* (Francis I, 1536, chap. I, Art. 37.) And later, in which advocates are relieved from disclosure "*en sorte que la déposition pourrait être réputée une révélation du secret* (Rouen, 1816). The provision in the Washington Oath is an essential addition to the Oath of Geneva.

6. *Ne diront paroles injurieuses contre les parties adverses ou autres* (Philip, VI, 1344).

7. *Seront donnés aux pauvres* (Francis I, 1536, chap. V, Art. 37).

So much for the State organisations and for the system which in each State regulates or tends to regulate the standing and professional relations of the members of its Bar. Until comparatively recently there was little approximation between their local organisations, but of late the action of the Association of the American Bar has gone far to weld into one compact body their diverse entities. The way for a unity of action was prepared by several broad facts. From the beginning, as we have said, although any member of a State Bar was entitled to practice in the Federal Courts, and as a matter of courtesy to

appear in the Court of any State not his own, the general consolidation of the country, the growth and extension of the power of the Federal Courts, and the extended facilities for inter-communication—these pave the way for approach. But more than any of these was the fact, that the underlying bed-rock system of law administered was the Common law of England.

I cite a remarkable passage in an address delivered to the Congress of the American Bar Association, held at Saratoga in 1900 :—

“On the settlement of the United States, our ancestors brought with them the Common law of England as bodily as they did their personal belongings. Local and other circumstances in their new home made a part of that law inapplicable, and they thus escaped many of the vexatious legal problems of the parent country. But even this extension and beneficent change serves to prove rather than disprove the continuity of legal evolution ; for by far the greater part of the law which they did not bring with them was moribund in its original habitat. The Revolution made no interruption in legal growth, so little in fact that some Courts in the United States have held that decisions in England since the Revolution in cases of first impression are authoritative here, on the theory that they are exfoliations of the Common law which we brought over with us.”

The law as administered generally throughout the United States can be termed Anglo-American law. It is the English Common law and the English system of Equity existing at the time of the Secession from England, with such modifications as exist in the State Constitutions and Statutes, in the Federal Constitution and Statutes, and in the adoption and growth of many legal principles and rules formulated from time to time by those eminent judicial jurists who, side by side with our own judges, have during the last hundred years evolved the general basis of the law from what it was to what it is.

There is one remarkable exception in the case of Louisiana, where, as a relic of its French and Spanish occupation, the Civil law is recognised as the basis of its legal system.

The author of the *American Commonwealth* points out, and it is a matter obvious to those who have been brought closely

in relation with American practitioners, that whilst their habits of legal thought closely resemble those of lawyers in England, they, in the United States, are on the whole more conservative in their tendencies. In England the great law reforms of the last fifty years have come from the lawyers. To borrow his expression "the masses" (in England, be it understood) "and their leaders have seldom ventured to lay profane fingers on the law, either in despair of understanding it or because they saw nearer and more important work to be done. Hence the profession has, in England, been seldom roused to oppose projects of change, and its division into two branches, with interests sometimes divergent, weakens its political influence." After pointing out reasons for the defensive attitude of the upper part of the legal profession in America, he proceeds to point out that the conservative instincts thus engendered are further stimulated by the habit of constantly recurring to a fundamental instrument—the Federal Constitution. In fine, he says:—

Thus one finds the same dislike to theory, the same attachment to old forms, the same unwillingness to be committed to any broad principle, which distinguished the orthodox type of English lawyers sixty years ago. Prejudices survive on the shores of the Mississippi, which Bentham assailed when those shores were inhabited by Indians and beavers, and in Chicago, a place which living men remember as a lonely swamp, special demurrers, replications *de injuria* and various elaborate formalities of pleading, which were swept away by the English Common Law Procedure Acts of 1850 and 1852, flourish and abound to this day.

As a general observation regarding their methods of forensic practice, the writer has come to the conclusion that English lawyers have much to learn from America in the conduct of criminal trials, so as to grant a substantial chance of successful defence to an accused person. Conversely, the American lawyers may, without disparagement, be invited to study the methods in which the English Courts administer their Civil jurisdiction. But both these matters cover a wide field of observation, and the contrast can only be broadly stated within the limits of this article.



Notwithstanding all these tendencies of centralization the American Bar Association, as we have said, is of comparatively recent origin. Speaking at the International Congress of Jurists at St. Louis in 1894, Mr. Walter S. Logan, a delegate from the United States Government, said :—

There are some of us whose hair is grey enough, so that we remember when the American Bar Association was founded. At that time the lawyers of the United States did not know one another. The lawyers who practised in the same land were acquainted, but their acquaintance was confined to a very great degree to the Courts they practised in. The Bar of the United States was unacquainted one man with another. To-day throughout the whole of the United States the lawyers know each other. The American Bar Association has had its effect, not simply upon the Bar itself, but upon our whole national life. The American nation is stronger to-day for what the American Bar Association has done. It has been a great promoter of patriotism.

Each meeting of this organisation tends to extend its influence and practical control.

We have noted that the American Bar Association has devoted itself to the task of the enunciation of a Code of Professional Ethics, and that in so doing they have adopted as their standard that of Alabama. This is in itself largely drawn from Sharswood's *Legal Ethics*, published in 1884. The Bar Association of Florida grounds its standard on Hoffman's *Resolutions in regard to Professional Deportment*, published in Maryland in the early part of the 19th century, one of the most singular and interesting of professional pronouncements on the duties of a profession.

The influence of the Association as a whole is naturally the last and the most insistent of the formative instruments. The latest step at the Portland Congress of 1907 was to present the Report of the Committee on the Code of Professional Ethics, to which reference has been made above, recommending the preparation of proposed canons for the 1908 meeting.

That is in the future, but it will be difficult, by any process of the most diplomatic framing, to substitute rules

more perfect in their appreciation of the struggles and the triumphs of the pursuit of an arduous profession, in which in times ancient, in times mediæval, in times modern, successes so brilliant and failures so poignant are to be recorded, than these old-world resolutions which form the code for the exercise and pursuit of the forensic war game in the old Spanish colony of Florida. We select some which illustrate not unpicturesquely (a) the duties towards the client, (b) duties towards the witnesses, (c) duties towards the adversary, (d) duties towards the brotherhood of the profession, and (e) duties towards the advocate himself:—

(a) To my clients I will be faithful ; and in their causes zealous and industrious. Those who can afford to compensate me, must do so ; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended ; and they shall receive a due portion of my services, cheerfully given. Should I not understand my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others, whose knowledge of the particular case may probably be better than my own.

(b) In the examination of witnesses, I shall not forget that perhaps circumstances and not choice have placed them somewhat in my power. Whether so or not, I shall never esteem it my privilege to disregard their feelings, or to extort from their evidence what, in moments free from embarrassment, they would not testify. Nor will I conclude that they have no regard for truth and even the sanctity of an oath, because they use the privilege accorded to others, of changing their language and of explaining their previous declarations. Such captious dealing with the words and syllables of a witness ought to produce in the mind of an intelligent jury only a reverse effect from that designed by those who practice such poor devices.

(c) In all intercourse with my professional brethren, I will always be courteous. No man's passions shall intimidate me from asserting fully my own or my client's rights ; and no man's ignorance or folly shall induce me to take any advantage of him ; I shall deal with them all as honorable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, though it shall wholly sever any personal relation that may subsist between us, shall produce no change in my deportment when brought in professional connection with them ; my client's rights, and not my own feelings, are then alone to be consulted.

(d) Should a professional brother, by his industry, learning, and zeal, or even by some happy chance, become eminently successful in causes which give him large pecuniary emoluments, I will neither envy him the fruits of his toils or good fortune, nor endeavor by any indirection to lessen them, but rather strive to emulate his worth, than enviously to brood over his meritorious success, and my own more tardy career.

Should I attain that eminent standing at the bar which gives authority to my opinions, I shall endeavor, in my intercourse, with my junior brethren, to avoid the least display of it to their prejudice. I will strive never to forget the days of my youth, when I was too feeble in the law, and without standing. I will remember my then ambitious aspirations (though timid and modest) nearly blighted by the inconsiderate or rude and arrogant deportment of some of my seniors; and I will further remember that the vital spark of my early ambition might have been wholly extinguished, and my hopes forever ruined, had not my own resolutions, and a few generous acts of some others of my seniors, raised me from my depression. To my juniors, therefore, I shall be ever kind and encouraging; and never too proud to recognize distinctly that, on many occasions, it is quite probable their knowledge may be more accurate than my own, and that they, with their limited reading and experience, have seen the matter more soundly than I, with my much reading and long experience.

Should it be my happy lot to rank with, or take precedence of my seniors, who formerly endeavored to impede my onward course, I am firmly resolved to give them no cause to suppose that I remember the one, or am conscious of the other. When age and infirmities have overtaken them, my kindness will teach them the loveliness of forgiveness. Those again, who aided me when young in the profession shall find my gratitude increase in proportion as I become the better able to sustain myself.

(c) My client's conscience and my own are distinct entities: and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

I add, in conclusion, the words of that eminent American writer on Professional Ethics (Hoffman):—"Law is a deep science; its boundaries, like space, seem to recede as we advance; and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence. In the language, then, of the late beautiful writer, I am resolved to 'consider my own acquired knowledge but as a torch flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance.'"

EDWARD S. COX-SINCLAIR.

V.—JURISDICTION IN DIVORCE.<sup>1</sup>

THIS subject was introduced at the Berlin Conference, but it was then thought, as the topic was so very important, and as it has been so thoroughly considered in this country, that it would be an advantage to the Association and its members, and to the profession at large, if we should also discuss it here. In the paper of Mr. W. G. Smith which he read last night, he has told us what the Divorce Congress of this country had decided was the best course to adopt in order to bring about a Uniform Divorce Law so far as it can be done in this country. It has been remarked here that it is quite impracticable to amend the Constitution of the United States so as to bring about in that manner a Uniform Divorce Law, and they have therefore adopted the next best method, which was used also in the case of the Negotiable Instruments Law—*viz.* that of drawing a general Bill covering the whole subject and requesting each of the States, if they thought fit, to enact it. It seems to me that is the best solution of this question that can possibly be arrived at in this country.

With these remarks I propose to pass on to the manner in which the Courts of other countries look upon these "Migratory American Divorces." They certainly have caused us great difficulty in England, and while, as I say, it is not my special practice, I have had experience on both sides of the Atlantic in such cases. A good many of them have come before me, and I have thus had opportunity of observing the grievous suffering that they cause, and the terrible results to innocent people which have been brought about by such fraudulent proceedings. American migratory divorces are a continual source of trouble in England as well as in this country. They are now reaping

<sup>1</sup> A paper read by Mr. J. Arthur Barratt, M.A., LL.B., of the Inner Temple, Barrister-at-Law and the New York Bar, at the Conference of the International Law Association, at Portland (Maine), August 30th, 1907.

their part of the rich crop of misery produced by the fraudulent divorce decrees rendered in the United States some twenty years and more ago. Some of the most lamentable cases have recently come under my notice in actual practice. I have in mind one especially painful case where a decree was procured more than twenty-five years ago; it was undoubtedly void; one of the parties married again and had children, and according to English law this offspring will most certainly be deemed illegitimate.

I cannot too strongly emphasise the fact that, while the English Courts will of course recognise American divorces when duly procured and without fraud, they will decline to hold valid such divorces where there has been no *bonâ fide* domicile of the plaintiff in the State where the action was brought and he or she simply resided in such State for the period required by its laws, and very soon after returned to the real domicile.

The House of Lords, in the comparatively recent case of Earl Russell,<sup>1</sup> quickly decided that the Earl was guilty of bigamy, though he had procured a divorce from his first wife in Nevada (it being held by the Divorce Court in a previous action that the American Court was without jurisdiction because of the want of a *bonâ fide* domicile of the Earl in Nevada), and they thereupon sentenced him to a term of imprisonment, though he had been advised by English and American counsel that his American divorce was valid. That was one of the most interesting cases of legal procedure imaginable. There was the House of Lords called upon to try a Peer, one of its own members, on a charge of bigamy. In accordance with the law of England, Peers have the right to call upon the entire Judiciary of England to assist the House of Lords in the determination of such legal questions. The majority of the English judges were present on this occasion, and there were present

<sup>1</sup> L. R. [1901], App. Cas., p. 446.

also the majority of the members of the House of Lords. There was Earl Russell, a young man in the prime of life, who had had a most unfortunate experience with his wife in England. He took advice there and in the United States. He went to Nevada and procured a divorce. He then married again and came to England; whereupon proceedings for divorce were taken against him by his first wife. The Divorce Court, upon his default, held the American divorce invalid. It turned out that he had not acquired a *bonâ fide* domicile in Nevada. He had simply gone there for the short time necessary to meet the requirements of the statutes of that State (which say that he must "reside" there), and then had got his decree and had come away almost immediately. The Divorce Court said that this did not constitute a *bonâ fide* domicile; a *bonâ fide* domicile is the first requisite for jurisdiction in divorce; his divorce was void, and therefore he was guilty of bigamy and adultery. Notwithstanding that the Earl had procured the best advice he could under the circumstances, he had transgressed the statutes of the realm and he was indicted for bigamy. The proceedings were removed to the House of Lords, and that body had the courage (for which I think all credit is due to them) to send one of their own members to gaol because he had broken the law, even though it was a mere technical breach of it brought about by mistaken advice as to a point of foreign law—it being admitted that he had no criminal intent.

Now I think that if the American Courts would exercise the same firmness and courage in the administration of the law upon high personages here who attempt to debase the law by deliberately alleging a domicile which never existed, and perpetrating a fraud upon the Court, the divorce colonies in the States would quickly dwindle in numbers and in quasi-aristocratic prestige. Many Americans are marrying British subjects, and it is now becoming an

exceedingly serious and frequent question in England as to how far these American divorces shall be recognised. Such divorces are almost universally looked upon with suspicion ; and it ought to be more generally understood than it is that the English Courts can, and do, whenever American divorces come before them, take fresh evidence in the Courts there to determine whether or not the plaintiff had in fact a *bonâ fide* domicile in the State where the divorce was granted. The mere recital in the American decree that the plaintiff was so domiciled is not enough. The English Courts determine that question for themselves independently.

I must confess I am afraid that jurisdiction of the Court in divorce cases, as a proposition of law, is not sufficiently studied by the average lawyer who undertakes divorce cases in this country. I had my attention called in New York only a few days ago to the case of a lady who thought it was a very simple and easy matter to get a divorce. She told her friends that she was going West to get a divorce. She notified the telephone company in New York to take her name out of the telephone book, but took great care to warn her friends that she was at home and could be communicated with by telephone. She went out to the Western States and engaged rooms, and in due course of time, after the requisite number of days of residence required by the statute had expired, she returned from New York to that State and came back again with a divorce decree in her hand. All I can say is that if the question of the validity of that divorce ever comes up before the English Courts, or before the American Courts, it will be declared absolutely void. The question of the *bonâ fides* of the domicile would be gone into, and it would certainly under those circumstances be deemed to be fraudulent and not *bonâ fide*. Obviously this litigant's counsel was ignorant of or careless about the most elementary rules governing jurisdiction. This question of jurisdiction in

divorce with reference to American decrees has quite recently come before the English Courts in *Armitage v. The Attorney-General*,<sup>1</sup> and *Bater v. Bater*.<sup>2</sup> In the *Armitage* case the wife, an English woman, had married a citizen of New York temporarily residing in England, and who had not abandoned his New York domicile. The wife had (after her husband had deserted her) gone to South Dakota, abandoning her residence in England, and acquired a *bond fide* domicile in South Dakota. She there brought action against her husband for a divorce; he appeared in the action, and filed an answer, together with a counter-claim or cross-petition, claiming divorce from his wife. The wife secured a divorce and then married a British subject in Denver, U.S.A., subsequently returned to England with him, and, at the time of action brought, had been domiciled in England for several years. In the meantime, her first husband, Gillig, had married again and described himself in the marriage register as "the divorced husband of Amy Gillig." After about five years Gillig petitioned to have the second marriage declared null, alleging that his first marriage was still subsisting. His first wife (now Mrs. Armitage) under a special statute,<sup>3</sup> petitioned the English Court for a declaration of the validity of her second marriage; Gillig was cited as a party; and the whole question of the validity of the South Dakota decree was examined in the English action. That is a most useful statute in England. You will observe that in this case the first wife married again; the husband had married again, and he presented a petition to have it declared that his second marriage was null and void, because, as he alleged, the American divorce decree was invalid. His first wife could not be made a party to this nullity proceeding under the English practice. Thus it was found that the husband might have proceeded in the English Court and have

<sup>1</sup> L. R. [1906], P., p. 135.

<sup>2</sup> *Ibid.*, p. 209.

<sup>3</sup> The Legitimacy Declaration Act, 1858, 21 & 22 Vict., c. 93.



procured a declaration that his wife's American divorce was void, without her appearance at all in that action; but fortunately there is this statute in England which says that any natural-born British subject, whose marriage or legitimacy is questioned, may petition the English Court for a declaration that the marriage was valid. This lady therefore petitioned the Court in that case to have her second marriage declared valid, and asked the Court to order that the husband's nullity suit follow the trial of her petition. That was ordered, and on her petition the whole question of the validity of the wife's American divorce was gone into, and it was decided that she had, in fact, acquired a *bond fide* domicile, and had abandoned her English domicile (she having taken great care to establish herself in the United States and live there for some time and absolutely abandoned her English domicile), and that her divorce was valid, and her second marriage was valid. This, therefore, settled the whole question, and the nullity proceeding of the husband was dismissed. This case illustrates the value of The Legitimacy Declaration Act, and is further important on this question of jurisdiction.

After very careful consideration, and after hearing the testimony of experts as to American law, Sir Gorell Barnes, the President of the Probate and Divorce Division, decided that as Gillig, the husband, at the time of the South Dakota decree, still retained his New York domicile, and had himself filed an answer and counter-claim to the petition in South Dakota, and since by the law of New York such proceedings gave the South Dakota Court complete jurisdiction over defendant Gillig (and therefore the Courts of New York were bound to recognise the South Dakota decree as valid), the English Court on grounds of international comity would recognise the South Dakota decree as valid in England. The President said:—"The evidence in the present case shows that in the State of New York the

decision of the Court of South Dakota would be recognised as valid. The point then is, Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognised in the State of New York—the State of the domicile as having affected and determined it.” The President also said that this point had not been distinctly determined by the English Courts in any other case. Thus that Court decided that the South Dakota Court had jurisdiction under the special facts to determine the marital status of a domiciled New Yorker and a former British subject.

The next case, *Bater v. Bater*,<sup>1</sup> was a still more complicated one. There the English Court decided that the Courts of New York had jurisdiction to divorce two British subjects, the husband having become domiciled in New York. The case was elaborately argued both in the Court below and the Court of Appeal. The facts were that the husband and wife separated in England, each claiming a cause of divorce against the other, and that both were at fault. This was a very curious case, because, the parties having separated, the wife, according to American law, would, if innocent, have the right to acquire a separate domicile. The husband came to America and took out his first papers preparatory to becoming a naturalized citizen, and settled in Brooklyn. The wife, as I say, being separated from him (he having abandoned her in England) by American law, would have a right, if innocent, to acquire a separate domicile. She came to New York and resided there. She brought action for divorce against her husband there, and he failed to appear. She got her decree, married a British subject in New York, and returned to England with her husband.

<sup>1</sup> (L. R. [1906], P., p. 209).

They subsequently separated, and ten years afterwards the second husband brought an action in England to have his marriage declared null, on the ground that his wife's first husband was alive. She set up the New York decree of divorce in bar, and the whole question of the jurisdiction of the New York Courts was thoroughly examined. The English Court took this ground,—that, while by English law the domicile of the wife is at the domicile of the husband (and though by American law, he having given her cause for divorce, she could acquire a separate domicile if she chose), nevertheless she had the right to elect, if she saw fit, to adopt the domicile of her husband in New York as her domicile. He being at fault, the Court said there is nothing in International law, and nothing on general principle which will forbid the wife in such a case saying that, while the American rule is a valuable rule, it is a rule adopted for the benefit of the wife, and not to her detriment—that for the purpose of the action for divorce the wife had the right to go to the domicile of her husband and bring her action for divorce there. There was no case in the Courts of New York exactly in point, and the President of the Probate and Divorce Division said he could see no reason why those principles should not be applied; and held the divorce valid and dismissed the nullity suit. The case went to the Court of Appeal, and there the decision was affirmed. The President said (p. 215):—"I feel that one is presented with a serious difficulty, because one has, so to speak, to place one's self in the same position as a judge in the State of New York would be in if this point was raised before him—in other words, to ascertain, through him, what is the rule he would apply in deciding this case." Referring to sections 1,756 and 1,768 of the Code of Civil Procedure, in discussing the question as to whether or not the wife, being separated from the husband, and in fact resident in another country up to within a short time of moving to New York,

could bring her action for divorce there, he said there was nothing to prevent the New York Court from saying (p. 216):—"If you have come to our Court and your husband is domiciled here, we will, apart from our statutory difficulties, give you relief. Then supposing that case is presented to the Court in New York, the Court would very naturally say, apart from being tied by the section, your husband is domiciled here: his home is here, and *prima facie* yours is here. You have come here to pursue him and obtain your remedy. Why should that remedy be withheld, because if you succeed you propose to return to your own country? I should have thought myself, as a matter of justice, expediency and convenience, it was very proper to allow a suit to be entertained in a foreign country in these circumstances, and I cannot help feeling that considerations of that character would weigh very considerably with a judge in the State of New York in deciding whether under such a term as the term 'resident' he was to exclude the petitioner from her right to maintain a suit. . . . I have come to the conclusion that this suit could have been maintained in the State of New York." The President held that, although the divorce was for a cause which would be insufficient for a decree in England, it would be held valid there because valid in New York (the place of the husband's domicile). He further said:—"If this country recognizes the right of a foreign tribunal to dissolve a marriage of two persons who were at the time domiciled in that foreign country, it must also recognize that their marriage may be dissolved according to the law of that foreign country even though that law would dissolve a marriage for a lesser cause than would dissolve it in this country." Referring to fraudulent divorces he said that:—"Where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there and so had induced the Court to grant a decree, the collusion or fraud

in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicile."

Then affirming the decision of the President of the Probate and Divorce Division, the Court of Appeal said (Collins, M. R., p. 225), as to a decree of divorce that it is a judgment that "is really indistinguishable from a judgment *in rem*. Some of the judges seem to have considered that for some reason it is not an absolute judgment *in rem*, but for all purposes it is on the same footing; that is to say, it is a judgment affecting the status of the parties. If it is a judgment *in rem* or stands on the same footing, as I think it undoubtedly does, can it be impeached in proceedings taken in this country by a person not a party to that judgment at all? . . . There is clear authority in our Courts that that cannot be done." He further said (p. 232):—"The law now unquestionably stands in this position. The Court of the existing *bonâ fide* domicile for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country."

Then Lord Justice Romer, in taking up this question of the separate domicile of the wife, said very clearly (p. 233):—"Now the question arises, Was the wife dwelling in the State at the time she brought this action? Undoubtedly, according to the law of the State, the wife, in the circumstances which happened here, could have had a separate domicile from that of the husband, but I take it that the wife might have exercised her option, and that she was quite entitled, if she chose, to say that her domicile still remained the domicile of her husband as assumed by him, that is to say, domiciled in New York State, and I think that by going, as she did, to dwell in the State for the purpose of bringing the action for divorce, and then bringing that action, it must be taken that she had elected to make that domicile, at any rate for the purposes of the

action, the domicile of her husband in New York State; and I cannot see that there is any good reason why the wife, if she chose so to elect her domicile, should not have elected to take that domicile for the purposes of the divorce if she could obtain it. Moreover, taking the expert evidence as a whole, I come to the same conclusion as that arrived at by the learned President, namely, that the wife had, according to the law of the State of New York, when she brought this action, a residence there within the meaning of the word as used in the code governing the law in the State of New York. The result is that, dealing with the question of jurisdiction from the point of view of the law of the State of New York, the Court had jurisdiction to entertain the action. Then how does the matter stand from the point of view of the English law? I have already stated that, on the facts, the husband had changed his domicile, and had acquired a domicile in the State of New York. According to the English law, until divorce the wife's domicile would be that of the husband, or, at any rate, might be that of the husband if she chose, to the extent of her electing to regard the changed domicile of the husband as her domicile; and there is no reason, according to English law, why she should not be at liberty, if she chose, to go abroad to the State of New York, electing for the purposes of the divorce proceedings her domicile to be that of the husband and suing him there; and, according to English law, I take it that, at the time of action brought and divorce granted there, the domicile of both the husband and the wife was the domicile of the State in which the Court in which the action was brought was situated, so that the Court there had ample jurisdiction according to English law. Therefore, in whichever way the matter is regarded, it seems to me clear that the Court granting this divorce had jurisdiction."

Lord Justice Cozens Hardy said (p. 238) the wife "by

her conduct manifested her election to treat herself as not having a separate domicile, but as following her husband's domicile in New York. This being so, it is now settled by authority which binds us that the Court of the country in which the parties were domiciled—that is to say, New York—was the Court having jurisdiction to decree a divorce, even though the divorce was granted for a ground which would not be sufficient in England.”<sup>1</sup>

Those are the two leading cases decided recently in England on this subject of jurisdiction in divorce, and I wish to summarise the points that have been decided by the English Courts on the question, not including, of course, all the points on which the English Courts would recognise these American migratory decrees. The English Courts will recognise an American divorce, assuming the proceedings to be regularly conducted in accordance with the law of the State whose Court grants the decree:—

(1) Where the parties are British subjects and the divorce is granted by the Courts of the State in which the husband and wife are *bonâ fide* domiciled. The wife for the purpose of divorce may elect to sue the husband at his domicile, even though by American law she might perhaps be entitled to acquire a separate legal domicile from his.<sup>2</sup>

(2) Where an English woman is married to an American citizen, and the divorce is granted by the Courts of the State where the wife is domiciled, and the State where the husband is domiciled would recognise such divorce as valid.<sup>3</sup> In that case you will recollect the husband was domiciled in New York, and he appeared in his wife's South Dakota action and filed a cross-petition. The Court then, of course, had jurisdiction over both parties and of the whole subject-matter, the wife (plaintiff) having a *bonâ fide* domicile there.

<sup>1</sup> *Harvey v. Farnie*, 8 App. Cas. 43; *Le Mesurier v. Le Mesurier*, L. R. [1895], App. Cas. 517.

<sup>2</sup> *Bater v. Bater*, L. R. [1906], P. 209.

<sup>3</sup> *Armitage v. The Attorney-General*, *ibid.*, 135.

(3) Where the husband and wife are American citizens and the divorce is granted by the Courts of the State where the plaintiff is domiciled and the defendant was served with the process within the State where the action was brought, or appeared in the action, even though for a cause not recognised in England—this on principles of comity because such a divorce would be recognised as valid throughout the United States of America.<sup>1</sup>

With these observations I wish to close this paper by making one or two suggestions. In England we get such cases as this. A wife has been informed that her husband is getting a divorce against her in the United States by default. She does not know where to apply, and asks where can we find out if such action is being brought? It is absolutely impossible to find out unless you search the Court records of every county in the United States. Then sometimes a man comes home to England and tells his wife: "You are divorced; there is the decree." The wife has heard nothing at all about it. Perhaps the husband will marry again and have children, and the question may arise as to the legitimacy of those children, and as to their right to inherit real estate, because by English law it is quite impossible to inherit English real property unless the person to inherit is legitimate according to the law of England. Now I suggest that in every State the decrees which are rendered in that State shall be filed in the office of the Secretary of State for that State; and a statute should be passed enacting that such decrees shall not be deemed final and operative until so filed. That is certainly a practicable provision, but it does not go far enough for the purpose. Some further record is wanted in which could be found all decrees of divorce which are rendered. Therefore it seems to me that some method should be

<sup>1</sup> *Armitage v. The Attorney-General*, L. R. [1906], P. 135; *Haddock v. Haddock*, 201 U. S., Supreme Court Reports, p. 562.



thought out by which a central Registry for divorce decrees could be established for the purpose of filing and registering divorce decrees rendered throughout the United States. Such Registry could be established in Washington and kept up voluntarily at the expense of the various States using it, and a statute could be passed in each such State providing that no decree of divorce in that State should be final until recorded in the Central Registry.<sup>1</sup> We then should be able to find out—first, whether a divorce decree had been rendered, and, secondly, where it had been rendered; and a woman could find out what her husband was doing, and proceedings could be taken in the proper State to annul or stop many of these fraudulent divorces.<sup>2</sup>

I think also, that, on the lines of my former suggestions, there ought to be a statute passed in every State, as I believe there is in some States, similar to the Legitimacy Declaration Act in England, by which when anyone's marriage or divorce is questioned, he or she can petition the Court to have a decision at once as to the validity or non-validity of the marriage or the divorce. As I pointed out in the case of *Armitage v. The Attorney-General*,<sup>3</sup> the wife was able to stop the nullity proceeding of her first husband (to which she could not be made a

<sup>1</sup> I speak with some reserve as to the constitutionality of such a Statute, but think some constitutional method could be devised for creating such a Central Registry. I think it would also tend to stop fraudulent and secret divorces if the summons or writ and petition were directed to be filed in the office of such Secretary of State, and in such Central Registry, immediately after service thereof—so that it could be ascertained when proceedings were begun, and steps could be taken at once to intervene.

<sup>2</sup> I also think it advisable that divorce proceedings should be under the supervision of the Attorney-General of each State, so that irregularities in procedure should be avoided as far as possible, and the alleged *bona fide* domicile of the plaintiff be enquired into at the outset. The State is vitally interested in such proceedings, and State supervision would tend to suppress fraud. "Divorce Lawyers" who advertise their business should be disbarred for unprofessional conduct.

<sup>3</sup> L. R. [1906], P. 135.

party) and get a declaration saying that her American divorce was valid. I think, therefore, if that suggestion were adopted it would avoid many great difficulties. The Attorney-General should be cited to prevent fraud, as in England.

Having made these remarks on this very uninteresting subject (to most people), I think that it would be advisable if we members of this Association were to appoint a Committee to confer with the Divorce Congress of the United States on the general subject of the foreign recognition of the decrees of divorce rendered in this country. I therefore suggest that such a Committee be appointed before we part.

I will only say in closing that we have in our experience most painful cases brought under our notice, and I think that intelligent people do not pay sufficient attention to this subject, which is really the foundation of American and English society. If marriage and divorce laws are not certain, the foundations of Government are not certain. If we are going to continue the state of affairs that we know largely exists nowadays, viz., that there is an increasing number of divorces and re-marriages about which it is extremely difficult to say whether they are valid or not, you can readily see that the foundations of society will soon be undermined. For there is no branch of the law where uncertainty and conflict lead to more disastrous consequences to innocent people than the Law of Divorce. I therefore urge upon all members of the Association, and all people of intelligence in this country and in England, to concentrate their attention upon this subject, to see if they cannot influence the passing of uniform laws throughout the United States. Lawyers also should do their part to bring about some uniformity in judicial decisions on this subject, so that we can advise our clients that a divorce rendered in the United States will be recognised in England,

and a divorce rendered in England of American citizens domiciled there will be recognised in the United States.<sup>1</sup>

J. ARTHUR BARRATT.

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*Note.*—The following resolution, submitted by Mr. Barratt, was adopted, and referred to the Council of the International Law Association :—

“That a Committee be appointed by this Association with power to confer  
“with the ‘Commission on Uniform State Laws’ of the United States on  
“the general subject of international recognition of divorce decrees, and  
“incidentally to collate the laws of all civilized countries on the causes for  
“which divorce is granted, and on divorce jurisdiction.”

The Council appointed the following Committee :—

Mr. J. Arthur Barratt, London ; Mr. W. G. Smith, Philadelphia ; Mr. W. O. Hart, New Orleans ; Dr. Schneider and Dr. Katz, Berlin ; M. Gaston de Leval, Brussels ; Prince de Cassano, Rome.

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<sup>1</sup> I see no reason why such Central Registry as is proposed should not be used in time for the record of births, marriages, and deaths throughout the United States. The record should also include decrees of nullity and separation. I brought this whole matter before the Bar Association of the City of New York at its October (1907) meeting, and it has taken the matter under advisement through its Committee on the Amendment of the law. Titles to real estate in the United States would also be rendered more certain by such registration of these matrimonial decrees.

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## VI.—CURRENT NOTES ON INTERNATIONAL LAW.

### Enemies in Belligerent Territory.

**I**T is difficult to treat seriously the decision in *De Jager v. A.-G. (Natal)*, reported L. R. [1907], A. C. 326. A Transvaaler residing in Natal failed to quit the colony immediately on the outbreak of the South African War in

1900. He soon had no chance to do so. His own country's forces occupied the part of Natal where he lived, and compelled him to join them by virtue of his allegiance.

For that (it is incredible to report) he was sentenced, on the restoration of peace, by a Natal Court to no less than five years' penal imprisonment and a heavy fine (£5,000); and the Privy Council has upheld the sentence. The ostensible ground of the decision\* is that the local allegiance of the alien continued after the outbreak of war, and was not put an end to by the hostile invasion. Such a theory is impossible to reconcile with the nature of military occupation. Granted that occupation no longer works a substitution of sovereignty, yet it goes far to substitute the invader as a temporarily supreme power in the land. In this very war, the British forces themselves pushed the rights of an invading army of occupation to the full limit; they even enacted oaths of subservience from the alien population. How can we refuse to others the wide rights in occupied territory which we claim for ourselves? Practically, the consequences of the judgment are disastrous. What can a man do when his help is claimed by his own sovereign's forces, present on the spot, and clothed with the authority of lawful combatants, but yield to the justice of the claim? It is an illogical and—to speak plainly—cruel alternative to make him elect between certain death and hypothetical penal servitude. The penalty is not deterrent—it is simply vindictive.

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Can we suppose that an Englishman—perhaps a militiaman—living in Odessa, would be doing wrong to Russia if he joined British forces who might temporarily occupy that city? How far is this novel conception of local allegiance to be pressed? Does it prevent the enemy resident from going home and joining his own army?—and why not? Does it make him liable to be forced to fight against his

own sovereign—and why not? The Hague Conference has been much exercised about the rights and liabilities of neutrals in belligerent territory. In happy ignorance of this decision, they have not thought it necessary to consider the liabilities of enemies there. It is a ruling which might have been in consonance with the deliverances of a Loughborough or an Ellenborough: it is surprising from a Loreburn. It seems to us, moreover, to be inconsistent with the terms of peace, which provided for a full amnesty. There was an exception for criminal acts; but the spirit of the amnesty was to cover all acts done in the *bonâ fide* prosecution of the war by alien enemies.

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The curious reason was incidentally given for this remarkable decision, that if it were otherwise held, the modern practice of permitting foreigners to continue in the country after the outbreak of hostilities must be given up: and the Committee almost seemed to be impressed by the spectacle that haunts the imagination of the yellow press—that of the conquest of England by an army of foreign cooks and waiters. Such an argument carries its own condemnation on the face of it. For a rule which rests on very modern practice cannot be a rule of the Common law. The consideration in question may be a good reason for declining to fall in with the modern notion, and for expelling resident enemies as heretofore. But it entirely fails to demonstrate that English law measures allegiance by the shadowy right of a dispossessed sovereign. It is abundantly clear that no such notion as that it is treason for a man to join his own country's forces was thought of in Napoleon's time. Otherwise his conduct in imprisoning Englishmen in France as a precautionary measure would have wanted the semblance of justification. The obligations of national allegiance are among the strongest known to the law. They may be suspended in some degree, in face of the claims of

the territorial sovereign. But when the territory passes out of his effective power, the claims of the natural sovereign revive in all their full force and dominion. The proper remedy of a nation which is afraid of its guests is to expel them. It is not entitled to permit them to stay as foreigners, and then to call down on them under all circumstances the penalties of traitorous Englishmen. It is to be hoped that science will repudiate *De Jager's Case*, and thus prevent the unnecessary creation of a new juristic anomaly.

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Let us quote in this connection the letter of Sir Leoline Jenkins to Sir William Temple, cited by Phillimore (I, 380, sect. cccxxv), as the opinion of "a most careful, learned and practical jurist":—

"Though my Prince should give his leave to settle myself, for instance, in Sweden, and that I should purchase and have land given me in Sweden, upon condition and by tenure of following the King in his wars; if my King should afterwards have a war with Sweden, that King cannot command me to follow him against my natural and original master. The reason of it is, he cannot command me to expose myself more than his own natural-born subjects do; which yet would be my case, if I should appear with him in the field against my Natural Liege Lord; into whose hands if I should happen to fall alive, he would have the right to punish me as a traitor and a rebel, and put me to the torture and ignominy of his laws at home, which he cannot pretend to do when he takes those that are not his born subjects, nor inflict anything upon them but what is agreeable to the permissions of war . . . ."

Serjeant Stephen, indeed, thinks that a commorant alien enemy commits treason by going abroad to join his master. But this is far short of saying that it is treason for him

to join his master when the latter comes to him, in the character of an occupant conqueror. In *U. S. v. Hayward*, (2 Gallison, p. 500), Story held that Castine, when in the possession of the enemy, was *extra ligeantiam reipublicæ*: and indeed the proposition cannot be disputed. The only question is whether an allegiance which was purely territorial, can continue as personal allegiance when the territorial reason has vanished. To hold that it does is equally contrary to principle and precedent. It would make continued residence in war-time tantamount to naturalisation.<sup>1</sup>

### Ogden v. Ogden.

Since *Le Mesurier v. Le Mesurier* no case of the importance of *Ogden v. Ogden*,<sup>2</sup> affirmed on appeal November 18th, 1907, has been decided in a British Court for matrimonial affairs. Two points require to be kept separate in dealing with the case: those of jurisdiction and of the test of matrimonial capacity. So far as the point of jurisdiction went, nothing startling was contained in the judgment. It declared affirmatively, what had previously been easy to infer from *dicta* of Lord Stowell and others, that a foreign Court's decree of nullity would not necessarily have the force of a decree *in rem*, even when pronounced by the Courts of the alleged husband's domicile. This is no departure from the principle of *Le Mesurier*, referring matrimonial causes to the Courts of the husband's domicile. For the question in the case is whether he is a husband at all or not. It would never do to enable foreign Courts to declare domiciled English people married or unmarried on the plea of domiciled foreigners, so as to bind them in England. Consequently, when, as here, a domiciled French minor purports to marry a domiciled English lady in England, a decree of the French Courts

<sup>1</sup> See the subject discussed by Professor Kenny, *Outlines of Criminal Law*.

<sup>2</sup> See *Law Magazine and Review*, May, 1907, p. 337.

determining her status and declaring her unmarried will not be regarded as conclusive. Had she appeared in the French proceedings and actively asserted the marriage, the case might no doubt be different—as she would then both (a) submit to the jurisdiction, and (b) estop herself from denying that she had the domicile of the person whose wife she asserted herself to be.

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Capacity, on the other hand, is a matter which there has been an increasing tendency of late to leave to the law of the domicile for determination. In the creation of a permanent status such as matrimony, this is no doubt more natural than it appears when we are contemplating the case of mere ordinary contracts for the sale of goods, the hire of services, &c., though Westlake thinks there is no difference in principle between a contract to marry and a contract to purchase an estate. So strong has the tendency been, that in *Cooper v. Cooper* (L. R. [1888], 13 App. Cas., at p. 99), Lord Halsbury laid it down broadly that “the capacity to contract is regulated by the law of the domicile” (and this hardly appears to be qualified by his immediately citing Story as saying, “with his usual precision,” that if a person is under an incapacity to do any act by the law of his domicile, the act *when done there* will be governed by the same law wherever its validity may come into contestation). We pointed out, nevertheless, last May,<sup>1</sup> that the practical consequences of this broad doctrine were somewhat dangerous: and we showed that the practical application of the principle was accordingly constantly evaded by a liberal application of the maxim that *l'ordre public* is paramount wherever it can be invoked,—and that there are no limits to such a process. But in *Ogden v. Ogden* no such indirect course is taken. The authority of the personal law is flatly denied.

<sup>1</sup> *Law Magazine and Review*, Vol. XXXII, p. 336.



The explanation, first suggested by Campbell, C., in *Brook v. Brook* ([1862], 9 H. L. 193), and followed by Cotton, L. J., in *Sottomayor v. de Barros I* ([1877], 3 P. D. 5), which would support such cases as *Simonin v. Mallac* ([1860], 2 S. & T. 77), on the ground that the matters there in question were matters of form merely, and so to be regulated, in any view, by the *lex loci*, breaks down here. The consents required to the marriage impeached in *Ogden v. Ogden* were such as could be dispensed with by no formalities. They were on a par with the royal consent which was absent in the *Sussex Peerage Case* ([1844], 11 Cl. & F. 85). Let us recapitulate the facts. Léon Philip, aged 19—and he might have been 14, for any difference that would make—was unable by the law of his French domicile to marry without parental consent. Without it, he married in England an English lady considerably older than himself, and had one child. This marriage the English Court has now declared valid. It had meanwhile been declared void in France. Philip had re-married, and his English wife had applied to the English Court, not for a nullity decree, but for a divorce. This had of course been refused her, as *ex hypothesi* in order to be divorced she must have been married—and, if married, the proper tribunal to divorce her was that of France, her husband's domicile. Unfortunately, she married again; this time a domiciled Englishman, Mr. Ogden. The present proceedings were brought by him for a declaration of nullity. As above explained, the Court could not decline to entertain the question, eminently proper for its decision, of whether a domiciled Englishman was, or was not married. Nor could it be bound by a French finding as to the marital status of a person who, but for the very matter in dispute, would certainly have been a domiciled Englishwoman. But in deciding to determine the question of her domiciled French "husband's" capacity by English law, they came to a con-

clusion entirely at variance with the recent tendency to treat the capacity of a given individual as the same in all countries—at any rate where so important a contract as matrimony is in question. True, in *Brook v. Brook*, both parties had the same personal law forbidding them to marry. True, in *Sottomayor v. de Barros I*, the same state of things prevailed. True, in *Sottomayor v. de Barros II*, Hannen counted the marriage valid where it did not. True, in *Mette v. Mette* ([1859], 1 S. & T. 416), it was only the law of a mere foreign *locus actus* that was disregarded in favour of upholding the provisions of (English!) personal law. True, in the *Sussex Peerage Case*, it was again a foreign *lex loci* that was ignored. But the weighty deliverances of Campbell, C., and of Cotton, L.J., coinciding as they do with the trend of juristic thought on capacity, are not lightly to be set aside. With all the desire possible to maintain the authority of the *lex loci* (by far the best and simplest rule in such cases), it is impossible not to see that either the Court of Appeal has over-ruled *Mette v. Mette*, or else that it has laid down a rule which is obviously unfair—namely, that the *lex loci* shall prevail when it coincides with the *lex fori*, and then only.

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Probably it would have preferred to over-rule *Mette v. Mette*. But, as a decision of forty-five years' standing, it cannot easily be set aside. The *Sussex Peerage Case* and *Mette v. Mette* therefore still establish the proposition that a personal incapacity to marry existing by English law will be enforced, in the teeth of the *lex loci*. *Ogden v. Ogden* establishes that a personal incapacity to marry existing by foreign law will be disregarded if unrecognised by the *lex loci* and by English law.

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The United States cases which are so freely cited in the course of the judgment are not in point. The Courts in

America are not bound by the decisions to which reference has just been made and are not obliged to make their pronouncements square with them. A word may be added on the point of jurisdiction. It may be asked why the English Court should not treat the French nullity decree as conclusive: since, if the marriage was good, the domicile of the lady was French, and the decree of the French Court as to her status decisive: whilst, if it was bad, *cadit quæstio*. The Court of Appeal's answer is the somewhat lame one that the French Court's decree is only meant to be of force "where French law prevails." That is probably not a correct view of the desires of the French legislator; but if it were, all private International law is a giving effect to Foreign law where it has no force of itself. The answer is inconsistent with the whole science. A truer explanation is, that before the English Court could decide whether the foreign Court was entitled to make its conclusive pronouncement, it must first decide whether the party had the foreign domicile. If, in the course of this investigation, it found definitely that a certain marriage was good, it could not then stultify itself by adopting the foreign judgment that it was bad. The French Court, in holding that Philip was never married, *ipso facto* disclaimed all intention of pronouncing exclusively on the status of Mrs. Philip. As our Court held that the marriage was good, it would have recognised such an exclusive pronouncement as decisive. But there was no necessity to infer one when it was not made.

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### Ambassadors.

In the *Law Magazine and Review* for May, 1906, we referred to the case of M. Taigny, the French envoy in Venezuela, and his claim to over-ride the local law in the matter of visiting vessels in Venezuelan ports. In the recent case of Prince Malcolm Khan, the Persian envoy

to Italy, the question arose of the competence of the local Court to grant a separation to the wife of a foreign minister. It is remarkable that it should have been decided in the affirmative by the Italian Court before which it came. The absolute exemption of a foreign minister from the jurisdiction of the tribunals of the locality where he carries on his functions is firmly established; and we can only surmise that the Court took a view corresponding to that of the Scottish Court in the *Moray Fifth Case*—namely, that the matter, not being provided for by any express article of the Italian Code, was one to be set right by the intervention of the Government, and not by itself. Persia is perhaps unlikely to make any formal complaint; and if the Prince were to invoke Italian law to assist him in recovering his wife's society, he would implicitly submit to its jurisdiction to separate her from him. If, however, she has been awarded some portion of his property, and should attempt to enforce that right, a very serious situation would arise. In any case, the assumption of a jurisdiction to dissolve a Mahomedan marriage is a sufficiently remarkable thing. It may be, however, that Prince Malcolm Khan Nizam is a Christian.

T. BATY.

## VII.—NOTES ON RECENT CASES (ENGLISH).

IT was surely one of Fate's ironies that, in *Attorney-General v. The Duke of Richmond Gordon and Lennox* (No. 2) (L. R. [1907], 2 K. B. 940), made the most democratic of Prime Ministers the defendant in an action brought by his own law officer, to recover duties out of the estate of a notable inheritor of royal bounty. The story begins with Charles II. That tolerant monarch, though sublimely free from narrow prejudices of patriotism, was very sensitive to paternal obligations. With a complacency that presumably was

justified he assumed such responsibilities towards no less than six male infants, and bestowed on each a dukedom with an income to be continued to all the favoured peers' descendants. Perhaps it might be said that the admitted fact that one's female ancestress was of a frailty, is not, by itself alone, a sufficient consideration for a dukedom, and a pension throughout all generations; but, even if the exalted half-dozen have augmented the inadequate consideration by imparting any stability to the Empire, which has escaped record, it may still be hoped that the legislative fabric has not been seriously weakened by two of these high dignities having lapsed. To one of the six, the first Duke of Richmond, and to his heirs general, the gracious monarch gave, in recognition of his duty, a charge of one shilling per chaldron on all coal shipped from the Tyne. Subsequent Parliaments loyally amended the grant in the interest of the illustrious descendants of the fascinating "Madame Carwell," until 39 & 40 Geo. III, confirming an agreement between "the Most Noble Charles Duke of Richmond and the Commissioners of His Majesty's Treasury," commuted the coal tax into a pension out of the consolidated fund of £19,000 a year for ever. From a conversion of part of this, the estate of Goodwood was purchased, and the Prime Minister for the time being was honoured with a trusteeship. The point of the case was whether the coal dues, and as a consequence the annuities, were realty and entailable. It was admitted in the case that they were not granted for services to the State, and Bray, J., held that they were entailable. The claim of the Attorney-General, therefore, prevailed against the resistance of his chief.

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In *Macbeth v. North and South Wales Bank* (L. R. [1908], 1 K. B. 13), an effort was made to bring the payee of a cheque within the terms of sect. 7 sub-sect. 3 of the Bills of Exchange Act 1882. A man, on the pretence of pur-

chasing shares on behalf of another, had procured from him a cheque for a large amount drawn to the order of the alleged vendor, whose indorsement the wrongdoer forged, and then paid the cheque to his own account with his bankers, who were a different firm from the bankers of the drawer. The law regulating the protection and the liability of two such banks respectively was settled by 16 & 17 Vict., c. 59, and by the case of *Ogden v. Benas* (L. R. [1874], 9 C. P. 513). Up to the time of that Act any banker was liable for cashing a cheque with a forged indorsement. But the Act, by sect. 19 (which was the origin of sect. 60 of the Bills of Exchange Act), removed this liability from the drawer's banker by enacting in effect, that such a cheque to order, purporting to be signed by the person to whom it is made payable, shall be sufficient authority to the banker to pay the amount of the draft without the obligation to prove the indorsement. *Ogden v. Benas* was a claim to extend the protection to any other person taking a cheque upon faith of the indorsement. But the Court decided that the Act "does not affect the drawer's right to get back his money from one who has obtained it by means of the forged indorsement." And the law has so continued. But a sham indorsement was further dealt with by the Bills of Exchange Act. Sometimes a fictitious person is named as payee in a bill of exchange, and to meet this, sect. 7 sub-sect. 3 enacts that "where a payee is a fictitious or non-existing person the bill may be treated as payable to bearer." This is reasonable as, of course, in such a case there could not be a genuine indorsement. In the celebrated case of *Bank of England v. Vagliano Bros.* (L. R. [1891], A. C. 107), this section was applied, where payment had been obtained over the counter of a forged bill, with a genuine acceptor but with drawer and payee both fictitious, "as if the forger had inserted the first names he came across in a directory." Some expressions in the

report of the judgment on that case were urged in *Macbeth v. North and South Wales Bank*—the main chance of success in which was to come within the sub-section—as showing that persons, even though existing, were “fictitious” if they had no concern in and no knowledge of the circumstances under which the cheque was drawn. But the Court held that though the payee was without such knowledge, and in fact had no shares to sell, yet, as he was a real person to whom the drawer believed the cheque would be handed, the sub-section would not apply. In the course of the judgment, *Vindon v. Hughes* (noted in Vol. XXX, No. 337, p. 481, of this magazine), was approved. There the person who honoured the cheque was a tradesman. Here the Bank, from the relation of customer and banker, were of course the defendants.

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*Smith v. Prosser* (L. R. [1907], 2 K. B. 735), is a reminder to those who, with imperfect knowledge, deal with negotiable securities, that, though the law has done a great deal to make safe the holder of a bill of exchange, it does not assume to relieve him from the obligation of protecting himself. A merchant in one of the colonies having occasion to fare abroad, gave to two persons a power of attorney, and deposited with one, on behalf of both, certain unstamped papers signed by himself, under written directions that the signed papers were to be issued as bills if, but only if, he sent instructions to that effect. One of the attorneys, without such directions, and unknown to his colleague, filled up the blank papers as bills and got them discounted. The discounter failed in an action against the signer. It is clear that having, as he had, knowledge of the existence of a power, he could have protected himself by demanding its production. And on this ground Fletcher Moulton, L.J., would have been prepared to decide against his claim; but the decision, not quite so concisely put, in places, as it

might perhaps have been, was given on the fundamental principle that the papers were never delivered in order to be converted into bills.

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*Assicurazioni Generali de Trieste v. Empress Assurance Corporation* (L. R. [1907], 2 K. B. 814) is completely covered, as to its main contention, by *Castellan v. Preston*, and as to the question of costs, by *Hatch Mansfield and Co. v. Weingott*, which apparently is not elsewhere reported than in 22 Times L. R. 366. But the case has some incidents that must be very unusual. It is seldom that unwarranted assurance claims are made in good faith and met unreservedly; more seldom that the unreality of the claim is a long time afterwards discovered by mere accident. Here the plaintiffs had assured certain cargoes provided the shipments were not on vessels of a specified owner, and the defendants had agreed to underwrite a certain part of the risk. Two vessels belonging to this owner, though the ownership was unknown to the plaintiff, on which assured cargoes had been shipped, were lost, and the plaintiffs paid the amount insured and received their quota from the defendants. Subsequently, in an expensive investigation, in an entirely distinct matter, the plaintiffs found that they had been deceived in respect of the ownership, and recovered the insurance paid. But they resisted the claim of the defendant for restitution on the ground that the wrong had been discovered by their own means at an expense greater than the defendant's contribution. The main question was given against them, but they were allowed the costs of the investigation that directly related to the shipments. This was on the strength of *Hatch Mansfield and Co. v. Weingott*, where the defendant had guaranteed to the plaintiffs the honesty of a servant who subsequently stole their property, and in their claim under the guarantee they were allowed to deduct from the value



of part which they had recovered from the thief, their costs of prosecuting him.

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The development of a chattel into a fixture is in one respect more remarkable than that of a tadpole into a frog, for the living organism, when it has attained the higher stage, does not revert to the incipient condition. But certain chattels, though they may become part of the freehold if affixed to the soil by a tenant, and will pass to the landlord if the tenant does not displace them, will nevertheless resume the quality of chattels if detached during the tenancy. A gas engine has often supplied an illustration of this paradox. In *Crossley Bros. v. Lee* (L. R. [1908], 1 K. B. 86) one was hired by a tenant under condition that the owner could remove it if the hire payment were in arrear. The tenant fell into the more serious position of being in arrear for rent; and the landlord distrained on the engine. The plaintiff, owner of the engine, asserted his rights and was successful against the landlord, on the strength of *Hobson v. Gorringe* (L. R. [1897], 1 Ch. 182), in which the decision was contrary to that in the similar case *Hellawell v. Eastwood* (L. R. [1851], 6 Ex. 295). Phillimore, J., whose judgment is admirably constructed, was explicitly in accord with the earlier case, though bound by the later one. For the present, at any rate, it may be taken that *Hellawell v. Eastwood* is no longer good law.

T. J. B.

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*Fear v. Morgan* (L. R. [1906], 2 Ch. 406), which decided on the authority of *Frewen v. Philipps* (11 C. B., N. S., 449), that leaseholders holding under the same lessor may acquire indefeasible right of light against each other and against the lessor, under sect. 3 of the Prescription Act 1832, has been affirmed by the House of Lords (L. R. [1907], A. C. 425).

Probably if the point had been *res integra* the decision would have been the other way. As Lord Macnaghten said, the only fault in the appellant's argument was that it came too late. Undoubtedly at Common law, the right could not be so acquired, and undoubtedly the Prescription Act 1832 was not intended to alter the law. But in fact, ever since *Frewen v. Philipps* (*supra*), lawyers have proceeded on the assumption that it has in fact been altered, and now it is too late to reconsider the matter.

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Two other interesting decisions as to easements of light may just be noticed. In *Andrews v. Waite* (L. R. [1907], 2 Ch. 500), Neville, J., held that any alteration in the manner of receiving the light which would not involve the loss of the easement after it has been acquired, will not be sufficient, if made during the period of prescription, to prevent the acquisition of the easement under sect. 3 of the Prescription Act 1832. The second is *Hyman v. Van den Bergh* (L. R. [1907], 2 Ch. 516), in which Parker, J., applied the principle that the twenty years' enjoyment required by sect. 3 must be the twenty years before action brought. There the plaintiff, after having acquired by nineteen years' enjoyment an inchoate right to light, gave the owner of the servient tenement (who had obstructed the light) a letter agreeing to pay a yearly rent for it. He in fact paid no rent under this agreement, and some years later the light was again obstructed. Held that during these years the right was enjoyed by agreement in writing, and consequently the plaintiff had not enjoyed the right within sect. 3 for twenty years preceding action brought.

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*S. Pearson & Son Limited v. Dublin Corporation* (L. R. [1907], A. C. 351), establishes two very healthy principles. The first is, that an express stipulation in a contract that the other party shall not rely upon, but shall verify for

himself, representations made to him, does not relieve the party making such representations from liability for actual fraud. Such a stipulation is to be taken as referring only to honest mistakes, not deliberate misrepresentations. The second is, that when a public authority is sued for fraud, it is not sued for "any act done in pursuance of any public duty or authority," and accordingly it is not entitled to the benefit of the Public Authority Protection Act 1893.

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In *Macnaghten v. Paterson* (L. R. [1907], A. C. 483)—an Australian appeal—a very uncommon point arose. There a husband and wife entered into a deed of separation under which the husband covenanted to pay to a trustee an annuity for the separate use of the wife without power of anticipation. This annuity was to be payable for a year certain, after which the husband might give notice to the trustee of his intention to reduce the annuity, and if all parties could not agree the amount, the covenant was to become void. At the end of the year the husband gave the wife notice, and she waived his giving it to the trustee. The judge who tried the case, held that the restraint on anticipation prevented her doing so. This was reversed on appeal and the Judicial Committee upheld the reversal. Surely the judge must have thought he was dealing with an infant, not a married woman merely restrained from anticipating the annuity, but in every other respect of full capacity? The trustee was only her agent, and if she thought she could manage her husband and her business better than he, why was she to be prevented?

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The somewhat strange decision of the Court of Appeal in *Attorney-General v. Mersey Railway Company* (L. R. [1907], 1 Ch. 81), limiting the injunction granted by Warrington, J. (L. R. [1906], 1 Ch. 811), restraining the railway company from running a system of omnibuses, has now been reversed

by the House of Lords and the decision of Warrington, J., restored (L. R. [1907], A. C. 415). Two remarks only need be made. The first is, that the injunction as limited by the Court of Appeal was unworkable, and it has never been the custom of the Courts to require persons to do the impossible. The second is, that if railway companies may without express powers carry on a system of omnibuses because it acts as a "feeder" to their railway, there seems no reason why they should not carry on also a system of tramways, or, for that matter, of railways without statutory powers.

Another decision of the House of Lords should be noted. When a railway company requires minerals under its track to be left unworked, the compensation to be paid is just the value of the minerals less the cost of working: *Eden v. North-Eastern Railway Company* (L. R. [1907], A. C. 400).

*In re Darby's Estate, Rendall v. Darby* (L. R. [1907], 2 Ch. 465), is a case that should surely never have had to be argued. There a landowner, who himself had mortgaged his lands, afterwards transferred them by voluntary conveyance to his wife. On his death subsequently the wife claimed that his executors should pay the mortgage debt. If they were not liable to pay this as well as the other debts of their testator, it would hardly have been necessary to pass, over fifty years ago, Locke King's Act, which, of course, applies where the mortgaged estate passes on death. The distinction between a mortgage made by the landowner himself and a paramount or "ancestral" mortgage was familiar enough then, though now some lawyers seem to have forgotten it.

The points in two decisions of that very able and learned judge, Swinfen Eady, J., which were commented on unfavourably in these columns, have lately been before the Court. One of these decisions is *Jenkins v. Price* (L. R.

[1907], 2 Ch. 229), where his lordship held that where a lessor's consent (not to be unreasonably withheld) was necessary to an assignment of a lease, and the lessor stipulated for a benefit for consenting to the assignment, this, owing to sect. 3 of the Conveyancing Act 1893, amounted to an unreasonable withholding of his consent, and so justified the lessee in assigning without it (see *Law Magazine*, Nov. 1907, p. 100). This decision has since been reversed on another ground (see L. R. [1908], 1 Ch. 10), and the Court declared that it did not express any opinion upon the grounds of his decision. While in *Andrew v. Bridgman* (L. R. [1907], 2 K. B. 494), Channell, J., considering whether money paid to secure a consent could be recovered from the lessor, held that it could not, and that the parties to the lease could, notwithstanding sect. 3, agree legally to a payment for the consent. Channell, J.'s, decision came before, though it was reported after, that of Swinfen Eady, J.

The other is *Bagot v. Chapman* (L. R. [1907], 2 Ch. 222). In commenting on it (see *Law Magazine*, Nov. 1907, p. 99), we pointed out that it was contrary to *Howatson v. Webb* (L. R. [1907], 1 Ch. 537), and that it was very dangerous to hold that a person was not bound by a covenant in a deed which he knew dealt with property in which he was interested, but which he would not take the trouble to read. *Howatson v. Webb* has now been affirmed by the Court of Appeal ([1908], 77 L. J., Ch. 32), and the Master of the Rolls and both the Lords Justices (Fletcher Moulton and Farwell) emphatically disassociated themselves from the remarks, and, it might almost be said, from the decision, of the learned judge in *Bagot v. Chapman* (*supra*). In particular, Farwell, L.J., went so far as to say that he doubted whether an educated man was not now estopped from the plea of *non factum est* as to a deed which he had deliberately executed.

J. A. S.

## SCOTCH CASES.

The case of *Dunlop Pneumatic Tyre Company Limited v. Dunlop Motor Company Limited*, which we noted in the November issue of 1906 (Vol. XXXII, p. 113), has now been affirmed by the House of Lords (44 S. L. R. 977). In the opinion of the House, it was a question of fact, whether the name of the respondent company was in the circumstances so similar to that of the large and well-known concern as to mislead the public into the belief that it was a branch of the appellants' business. The two companies did not to any considerable extent deal in the same articles. The name of the small Scottish company seemed to have been adopted *bonâ fide*, being the family name of the two brothers who, before the limited company was formed, had in partnership founded the business taken over, and there was no ground for thinking that the small repairing business done in Kilmarnock did or could do any unlawful harm to the appellant company. The complainers had no claim to the exclusive use of the name Dunlop which was a common name in Scotland. While it was true that the object of two companies need not be absolutely identical to entitle the complainers to relief, it was also true that there must be great similarity, and it was not established in this case that the measure of similarity was sufficient either in the name employed or in the nature of the trade sought to be carried on. In the words of Lord James of Hereford, "There are unwary people in the world, but a man who employs his own name in carrying on his business has a right to regard the people whom he may attract as being capable of exercising and being in the habit of exercising thought."

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In *Kirkwood & Sons v. Clydesdale Bank Limited* (45 S. L. R. 3), a customer of a bank had a current account and also several

loan and cash accounts which were in various ways secured. Immediately before his death he drew a cheque for nearly £1,600 upon his current account, which, upon being presented, was dishonoured by the bank on the ground of the customer's death and of there being no funds available. There were sufficient funds in the current account to meet the cheque, but the bank pleaded that the whole indebtedness of the deceased, whether specially secured or not, must be taken into account, and that the total debit balance on the other accounts at the date of the death was £29,100. The drawer of the cheque contended that there was a custom of dealing between banker and customer, which precluded the bank from refusing to honour a customer's cheque on current or working account without notice to the customer of a contrary intention (*Cumming v. Shand*, [1860], 5 H. & N. 95, *per* Pollock, C.B., at p. 98; *Buckingham & Company v. The London and Midland Bank Limited* [1895], 12 T. L. R. 70). Further, it was pleaded (1) that the cheque in question being for value, operated according to the law of Scotland, an assignment of the sum for which it was drawn in favour of the holder when presented (Bills of Exch. Act 1882, ss. 53 (2) and 73), and (2) that even if the bank were entitled to set off the debit balance on other accounts against that at the credit of the current account, it was not entitled to do so without realising the stocks and shares held in security, and "discussing" the guarantors.

The question in the view of the Court was whether, in point of fact, the bank at the time of the presentment of the cheque had funds of the drawer in its hands, and to this question their Lordships of the First Division gave a negative answer. The state of affairs between a banker and his customer as at any given time, "must be taken to be the state of affairs upon all accounts." The fact that the bank held securities did not alter the relation of debtor

and creditor as between the bank and its customer. \*The argument founded upon the English cases regarding the custom, and consequent duty of bankers to honour cheques on current account, did not affect the present question, because the cheque as a cheque had in this case been countermanded by death. There only remained to consider the effect of the statutory enactment that in Scotland a bill or cheque operates an assignment of the sum, in favour of the holder, from the time when it is presented to the drawee. The sub-section founded on is qualified by the words "where the drawee has in his hands funds available for the payment," and upon a true accounting there were no such funds.

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The peculiar Scottish process of arrestment in order to found jurisdiction at the instance of a Scotsman against an Englishman or other "foreigner" (*jurisdictionis fundandae causa*), came under review in the case of *Leggat Brothers v. Moss' Empires Limited* (45 S. L. R. 67). The arrestment in question was held ineffectual because, had it been an ordinary arrestment on the dependence of an action, or following upon a judgment (garnishee order), it would not have attached any funds or property. The chief interest in the case consists in the lucid account given by the Lord President of the history of this somewhat anomalous form of diligence, and the restrictions upon its exercise which are demanded by international policy. It differs from an ordinary arrestment in respect that it does not attach the subject arrested to any effect beyond that of enabling the arrester to pursue his action in Scotland. Immediately upon this purpose being effected, the arrestee may safely part with the funds or property just as if the arrestment had never been laid on. On the other hand, the Court was of opinion that the same rules must hold in each case, so far as regards the validity of the attachment itself, and



judged by this standard the projected action in Scotland was improperly founded.

According to Lord Corehouse, in the case of *Trowsdale's Trustee v. The Forcett Railway Company* (1870, 9 M. 88), the species of arrestment referred to was "plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei*. It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced contrary to principle from views of expediency and for the encouragement of commerce." In *Trowsdale's Case* (*cit. sup.*) it was held "that the doctrine must not be carried further in any case than is expressly warranted by authority and precedent," and the Court in the case now under notice was of the same opinion.

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The law as to passing the property in an unfinished ship was incidentally considered, both by the Court of Session and by the House of Lords, in the case of *Barclay, Curle & Co. Limited v. Laing & Sons Limited* (45 S. L. R. 87). The main contention was as to the validity of an arrestment (garnishee order) laid by an English firm on the dependence of an action in Scotland against an Italian firm, who were said to be the owners of the ship arrested. The determination of this question depended on the answer to the further question whether the property had passed from the arrestees (a Scottish firm of shipbuilders) to the Italian debtors as buyers. The action was at the instance of the Scottish shipbuilders, who maintained that the ship remained their property until it was completed, and that consequently it was incapable of being attached as the property of any third person. The Scottish Court held that no property had passed, and the House of Lords affirmed the judgment.

The judgment in itself is no doubt sound, but some of the *dicta* of the judges are open to reflective if not critical comment. It was said, for example, of the old Scottish case of *Simpson v. Duncanson's Creditors* (1786, Mor. 14,204), that its authority had been very much shaken, if not completely destroyed, by the observations made upon it by Lord Watson in *M'Bain v. Wallace & Co.* ([1881], 8 R. (H. L.) 106, at p. 116) and in *Seath v. Moore* ([1886], 13 R. (H. L.) 57, at p. 64). Now, Lord Watson's remarks in the cases referred to were *obiter*, and, so far as *M'Bain's Case* was concerned, they had no bearing upon the special ground of judgment which the House of Lords saw fit to adopt. An entirely different view as to *Simpson v. Duncanson's Creditors* had been expressed in the Court of Session at a previous stage of *M'Bain's Case*. Lord Justice-Clerk Moncreiff characterised it as "a leading case, establishing the doctrine that if the price of a vessel in the building yard be payable by instalments as the vessel proceeds, payment of the first instalment will suffice to transfer the property without further delivery, on the principle of specification, the shipbuilder holding thereafter for the true owner." The peculiarity is, that the Scottish case now sought to be impugned lies at the very foundation of the existing English law on the same subject (*Abbott on Shipping*, 7th ed., p. 3; *Wilkinson on Shipping*, pp. 25 and 30 note; *Foard on Shipping*, p. 150). The ground upon which the House of Lords decided *M'Bain's Case* (which was one of security and not of sale) has been taken away by the subsequent repeal of the first section of the Scottish Mercantile Law Amendment Act 1856. The Sale of Goods Act 1893, which comes in the place of the repealed section, expressly excludes security from its operation (sect. 61 (4)). The consequence is, that if we set aside *Simpson v. Duncanson's Creditors* there will, so far as security is concerned, be a different rule in Scotland\* from that still existing in England. Scotland has no reason to be ashamed of *Simpson's*

*Case.* On the contrary, the judgment may be admired and venerated as the foundation of the Common law of the subject, not only in the country of its birth, but also in England and America.

R. B.

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### IRISH CASES.

We have had occasion to refer, in previous notes, to the difficulties of title which may arise in cases where, on the tenant of a holding dying intestate, his widow and children remain on in possession without any administration being taken out. The case is a common one, and the difficulties usually come to be considered long after the death, on the holding being put up for sale by some or one of the persons who have remained in possession, others having gone away or died; and counsel, advising on the title on behalf of the purchase, may then have to consider very complicated questions as to the effect of the Statute of Limitations upon the shares of those who originally became entitled at the death. It can hardly be said that these difficulties are lessened by the decision of the Court of Appeal in *Maguire v. M'Clelland's Contract* ([1907], 1 Ir. R. 393). It had formerly been thought, on the authority of *Graham v. Chambers* (36 I. L. T. R. 108), that if any of the children were minors at the time of the death, whoever took possession took it partly as a bailiff or trustee for those minors, and that such possession continued to be of that character during that person's life, notwithstanding the absence of any of the minors. Practically, therefore, once it appeared that there had been minor children, no person in possession could give a good title to a purchaser (as to the entirety of the holding) except by showing that the interests of the minors had been actually discharged. The present case modifies that principle very considerably. A yearly tenant died in 1864, leaving a widow and four minor children in

possession ; no administration was taken out ; the widow re-married in 1866, and her second husband was accepted as tenant of the farm by the landlord—a circumstance which of course had no effect upon the equitable interests. All the children left the farm before 1883 ; none of them had ever returned, or made any claim to a share in their father's assets, nor was any acknowledgement of title made to any of them from the time when they left. The second husband died in 1901, having bequeathed the farm to his widow for life, and after her death to the vendor. The widow having released her life estate to the vendor, he in 1907 contracted to sell the farm to the purchaser. The latter made a requisition that the interests of the children should be accounted for, and on the vendor's refusal, a summons was brought. The Court of Appeal held that although the possession of the widow and the second husband was originally that of bailiffs for the minors as regards two-thirds of the farm, it was changed when the children went away without making any claims as to their shares, and that the Statute of Limitations began to run against each child who left the farm on such child attaining twenty-one. They therefore held that a good title would be shown on proof that no claim had been made by or acknowledgment given to the children. They thought, in short, that the departure of the children was a sufficient "break in the possession" of the mother to change the character of that possession, and to dissolve the relationship which, up till the time of such departure, prevented the Statute from running. "I would tell the jury in an ejectment," said Fitzgibbon, L.J., "that as each son of the former tenant left the place without making any claim, he supplied some evidence that he had no claim ; and that when many years had passed, and the statutory period had expired, and still no claim was made, it ought to be presumed that the interest was extinguished under the Statute of Limitations."

It is not altogether easy to work out the theoretical grounds of the decision. If the mere fact of departure is, as some members of the Court seem to say, evidence that the person going away had no claim, why should it be necessary to wait for twelve years to have that claim (assumed non-existent) barred by the Statute of Limitations? It is also not easy to see exactly how the fact of departure breaks a relationship of trustee and *cestui que trust* existing up till that time. If A.'s possession of a thing is a possession as trustee for B. so long as B. remains in physical occupation of the thing along with A., it is curious that A.'s possession should cease to be that of a trustee once B. ceases to be in physical occupation. It is to be feared that the effect of the decision will be to put persons advising on titles of this kind under the responsibility of deciding upon doubtful matters of fact, as to which the evidence may often be unsatisfactory.

A Court of Equity will not enforce payment by sale of property subject to a trust, when the effect of such sale would be to destroy the trust. This principle was applied in *Bowman v. Hill* ([1907], 1 Ir. R. 451), an action of a somewhat unusual character. On a new Presbyterian congregation being formed, a lease was made to certain persons, as trustees for the congregation, of ground for the erection of a church and manse. These were built, and it turned out that a large sum was required to pay for the building over and above what had been subscribed for the purpose: the congregation authorised the raising of this sum by an overdraft from a Bank, and appointed the plaintiffs and defendants to act as guarantors for the overdraft. Under this guarantee the plaintiffs eventually had to pay the amount of the overdraft; the defendants paid to the plaintiffs their proportion, leaving a sum of over £1,000 still to be borne by the plaintiffs, which was treated as a congregational debt in

the annual church accounts. The plaintiffs sued the Board of Deacons and the trustees for the congregation to raise the amount by a sale of—and the appointment of a receiver over—the property comprised in the lease. They failed, as against the property, upon the ground above stated. “The principle of our decision is, that the enjoyment by a congregation of an advantage for which some members had made themselves liable to pay, raises no equity to apply the congregational property to indemnify some individuals against the failure to obtain the contributions which were expected to cover the expense.”

The House of Lords has affirmed the judgment of the Court of Appeal in *Vandeleur v. Glynn* ([1907], 1 Ir. R. 481), referred to in these notes in Vol. XXXI, *Law Magazine*, p. 232.

A bequest to A. “for her education; should A. die under age, to be given to her sister:” entitles A. during her minority to the capital, and not merely to the income of the legacy, so far as it is properly required for her education.—*Falls v. Alford* ([1907], 1 Ir. R. 486).

Another case, in which the question to be considered was the effect of a gift for maintenance and education, is *O'Connor v. Butler* ([1907], 1 Ir. R. 507). There, however, the question was as to whether a direction that the person to whom property was given should apply it for the maintenance and education of children prevented that person from taking beneficially. As might have been expected, it was held that he took all the property as a trustee, and not beneficially. Annexing to a gift the words “to be applied” apparently always imports an obligation, and negatives a taking beneficially. This, it may be noticed, is not the case of a precatory trust—it is a gift for a specific purpose, and therefore an ordinary declared trust.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*International Law. Part II.—War.* By JOHN WESTLAKE, K.C., LL.D. Cambridge: The University Press. 1907.

Professor Westlake discusses with his accustomed learning and ability, if with some tendency to press abstract principles to conclusions which cannot be said to be generally accepted, the topics which have been so much to the front during the Russo-Japanese War, and the deliberations of the Hague Conference. The subject is methodically mapped out, commencing with an elaborate analysis of the scientific conception of war in the abstract. The actual rules of modern warfare are, perhaps most fitly, treated in the main in the form of a commentary on the various and numerous provisions of the old Hague Convention. At the end of the volume a very interesting and valuable account is given of the modifications introduced by the Conventions of last year. Such burning questions as the bombardment of open ports and the misuse of submarine mines are treated with great clearness and brevity. Dr. Westlake is opposed to the exemption of private property from capture at sea, and gives excellent, if not necessarily convincing, reasons for his attitude. On more technical points there is some room for disagreement with his conclusions, and we hope to publish shortly a paper which deals with some of these. In particular, we cannot think that, on any view of neutral obligation, many jurists will agree with him in condoning the violation of neutral territory in the case of the *Retschitshy*. But Dr. Westlake is never too tender of territorial rights. We fail also to see how one State can proceed to coerce another by active violence without being at war with it. Misprints are infrequent; but "were" (p. 161, *n.*) should apparently be "mere," and "L. Q." (p. 256), "L. Q. R." It is pleasant to observe the tribute paid to a great and neglected jurist, Professor Lorimer, whose works would in any other country have been in the hands of every student of law. And "earnest desire" is exactly the right translation for "*vœu*."

*The Law of Married Women's Contracts.* By M. R. EMANUEL, M.A., B.C.L. London: Butterworth & Co. 1907.

Married women have been called "the spoiled children of legislation," and in spite of the Married Women's Property Acts it is by

no means easy or safe to say when they may, or when they may not be sued on contracts which they have made. Mr. Emanuel has set himself to clear up these questions as far as may be, and his book is a valuable contribution to the knowledge of the subject. The arrangement of the work is a good one.\* He begins by considering to whom credit is given, and points out that though in many cases a person contracts with a married woman, with no clear intention as to whether he is giving credit to the wife or husband, yet there are certain *prima facie* presumptions, such as, that if a married woman living with her husband contracts for necessities, she contracts as agent for her husband, and that the credit is given to him. This is confirmed by the leading modern case *Paquin v. Beauclerk*, although the House of Lords were evenly divided on the question whether it were possible for credit to be given to the husband when the contracting party did not know the wife to be an agent. The next chapter deals with necessities, and we are glad to note that justifiable legal expenses have been held to be necessities. In the third chapter we find discussed the various grounds on which a husband may be made liable for his wife's contract; and the grounds of defence open to the husband in each case. The method Mr. Emanuel pursues seems to us an excellent one, of which a good example is that of a case where it is contended that credit has been given to the husband and authorised by implication of law. He takes the four ways in which such implication may arise, namely: (1) cohabitation; (2) estoppel or holding out; (3) necessity; (4) ratification. He deals with these one by one, and after each points out how this implication may be rebutted. These grounds of rebuttal are in each case (1) revocation; (2) private allowance; (3) change of status; (4) separation. A married woman's personal liability on her contract is treated under the three heads of (1) as principal; (2) from warrant of authority; (3) by estoppel. No case is cited in which a married woman has been held liable on the two last of these grounds, but the assumption is based on the expressions used by Brett, L.J., in *Drew v. Nunn*, and Cozens-Hardy, L.J., and Lord Macnaghten, in *Paquin v. Beauclerk*. Lastly, "remedies against married women" are considered at some length. We have endeavoured to point out the scheme of this work, and have nothing but praise for the manner in which it is carried out. We may point out that Mr. Emanuel is not oblivious of the many difficult points which are connected with the subject. He points



out that it is doubtful if a husband can be made liable for a bill of exchange accepted by a wife who is an agent in fact when his name does not appear on the bill; and that it cannot be said that the principle of *Jolly v. Rees* has been entirely affirmed by the House of Lords in *Debenham v. Mellon*. In spite of Mr. Lush's arguments in his well-known work, the Author is of opinion "as the cases stand at present, an inadequate allowance will not rebut the implied authority of the husband." On the doubtful point of whether the possession by the wife of private means is enough to rebut a wife's implied agency, he is of opinion that if credit was in fact given to the husband it will not affect his liability. A useful warning is given as to the futility of a notice in newspapers that a husband will not be liable for his wife's debts.

*The Annual County Courts Practice, 1908.* By His Honour Judge SMVLV, K.C., and W. J. BROOKS, M.A. London: Sweet & Maxwell.

This is one of the "Annuals" that are practically necessities, and needs little recommendation. The principal alteration in the new edition consists in the insertion of the Workmen's Compensation Act 1906 and the Workmen's Compensation Rules 1907, together with a summary of the practice. Such small changes in procedure as have been made during the past year are duly noted.

**Third Edition.** *Investigation of Title.* By W. H. JACKSON. London: Stevens & Sons. 1907.

That this work has been found useful is proved by the fact of its having now reached its third edition. Mr. Jackson alone is responsible for this edition. He has carefully revised it and made considerable additions. The form is not a very usual one, but is well adapted for its purpose. It consists of an alphabetical digest beginning with Abstract and ending with Wills. The amount of matter under each heading varies considerably, the longer ones which we have noticed being Leasehold Property, Mortgages, Death Duties and Wills; but they are all short, none of them, we think, reaching twenty pages. They are, however, sufficient for their purpose, which is to act as a reminder, not as an exposition, of the law. At the end of each heading are suitable precedents of requisitions, and there is at the end an Index to the Requisitions. A wide field is covered, and some of the points suggested are not, we think, very likely to occur to one's mind without a hint. As an instance, we may give the one as to Expectant Heirs. The work is of undoubted use to conveyancers.

**Sixth Edition.** *Dowell's Income Tax Laws.* By J. E. PIPER, LL.B. London: Butterworth & Co. 1908.

All those who have incomes are interested in the Income Tax Laws, and the interest is likely to increase, though the income may become less under the increased activity and pressure on the part of the Inland Revenue. Unequal as any conflict must be between a private individual and a Government Department, it is as well to know what you can of a very difficult branch of law, and do what you can to protect your clients from a remorseless Treasury. Although the present work was considerably enlarged and altered in 1902, yet several important cases, and at least one important statute, required incorporating, and quite justified the issue of a new edition. The important statute is the Finance Act 1907, which is referred to again and again, and we think Mr. Piper follows a good plan in giving the full text of the section he refers to each time. Another good plan pursued is that of giving the repealed part of statutes, though in a different type, and we notice with satisfaction that the dates of all cases cited, both in the Table of Cases and in the text, are given. Although a large number of statutes is given in whole or in part, the greater part of the work is taken up with three statutes. These are the Income Tax Act 1842, which takes 326 pages; the Income Tax Act 1853, which takes nearly 70 pages; and the Taxes Management Act 1880, which covers nearly 140 pages. All the Acts are very fully annotated, some of the sections having the somewhat unusual feature of preliminary notes. We believe all the cases decided on the various sections will be found to be referred to in the proper places. Some of the most important cases decided since the last edition are, *Attorney-General v. London County Council*; *Kodak, Limited v. Clark*; *De Beers Consolidated Company v. Howe*. These are all important and difficult, and we think it would have been a distinct advantage if Mr. Piper, in addition to telling us what was decided in them, had given us further assistance by some discussion on and comparison of them. We have not noticed anywhere anything of this sort, or any criticism of an important case, though some of them have been the subject of considerable discussion. We do not know how far the fact that Mr. Piper is an official of the Inland Revenue, and that the present edition may be in some sense, like the last, an official publication, accounts for what we cannot help considering a defect.

*The Law and Practice of Divorce.* By G. L. HARDY. London: Effingham Wilson. 1907.—A small book dealing, within reasonable compass, with an important branch of the law, is generally useful; and we think that Mr. Hardy's work will prove so, not only to the solicitors and students for whom it is designed, but also to the occasional practitioner in the Divorce Court. The book is admirably clear in its arrangement. Divided into two parts, the first deals with the jurisdiction of the Court, and the grounds for, and answers to petitions for divorce and judicial separation. The second treats of the procedure. One chapter is devoted to a supposititious case worked out from "Citation" to "Decree Nisi," while appeals and after-effects, such as Alimony and Custody of Children, are also dealt with in this part. There are Appendices containing Statutes, Rules of the Court, and Forms and Fees: and a further Appendix contains the Matrimonial Causes Act 1907, and the Deceased Wife's Sister's Marriage Act 1907. The Index is a full one, but the Table of Cases gives no references to the Reports. The book which also contains the latest Case-law, is clear in style, and we can recommend it.

*Student's Guide to Roman Law.* By D. CHALMERS and L. H. BARNES, B.A. London: Butterworth & Co. 1907.—We hardly agree with the Authors in their belief expressed in the Preface, that there is need for a concise and simply-worded text-book on this subject. It has been our lot to review many such. Their work will, however, take a good place amongst the smaller books on Roman law. There is a lucid Introduction showing the sources and the historical development of the law, and giving some account of Gaius and Justinian. The various tribunals and actions are also dealt with. Of the work itself there are two parts, the one devoted to Justinian the other to Gaius. Each part in turn is divided into books as in the original. The style and diction are clear for the most part, if we except such expressions as "The work . . . . is heralded in by two juristic definitions."

*The Yorkshire Registries Acts 1884 & 1885.* By C. J. HAWORTH. London: Stevens and Sons. 1907.—"These Acts," says the Author, "have worked smoothly"; and he advocates an extension of this system of registration of documents to other parts of England. His book is designed not only as an exposition of the law, but as a "reminder of points of practice the disregard of which often at the present time causes needless delay and trouble." The three Acts

concerned are set forth in full with ample notes and references to the decisions in point. All the necessary Forms and Rules are also given. The Table of Cases should have references to the Reports. The book may prove useful to those affected by these Acts.

*A Guide to Trust Accounts.* By P. W. CHANDLER. London : Butterworth & Co. 1907. Recent events, and a consequent correspondence in the Press, have had the effect of stimulating interest in this subject ; and we think this is not the first book to deal directly with it. Mr. Chandler attempts to prescribe a system on which Trust accounts may be kept, and he claims that, however elaborate the accounts may be, the system given may be used as a basis. Two essentials are involved (a) the Schedule containing a list of the Assets ; (b) the Cash and Securities Account recording the dealings with them. The first chapter is historical, and in subsequent chapters the system recommended is thoroughly explained. The Appendices illustrate the text from the estate book of one Mr. William Roberts—from Will to Income Account. We do not doubt that this system will be largely employed by Trustees and Executors.

*The Law relating to Freight.* By J. E. R. STEPHENS. London : The Syren & Shipping. 1907.—This book is one of a series of handbooks which the Syren & Shipping are issuing primarily for the use of persons interested in shipping affairs. Its predecessor, on Demurrage, by the same Author, was reviewed by us, and, we are glad to learn from the Preface, has met with success. Mr. Stephens deals with his subject well and, on the whole, clearly ; though we confess we found it somewhat hard to follow him in the opening definitions. In his anxiety to collect the authorities on the nature of "Freight" he becomes a little involved. But generally the book is excellent. Each chapter deals with a well-defined division of the subject, such as Manner of Calculating Freight ; Mode of Payment ; Payable to whom and by whom, &c. As far as we can judge, the most recent cases are included. The "finish" of the book is admirable, there being a good Index and a thorough Table of Cases with full references. We might suggest a Table of Abbreviations of Reports for the next edition.

*The Lawyers' Reference Book.* London : Sweet & Maxwell. 1907.—One is so often puzzled by a cryptic reference in initials to some ancient report that this handy guide to the English, Scotch, Irish, and Canadian Law Reports must be welcome. Besides

complete chronological lists of these reports, the book contains lists of the English Law Reports from 1810 to 1907, showing the dates of the volumes and the concurrent series of reports; a list of abbreviations; a table of Regnal Years; and a Table showing the corresponding volumes of the old Reporters and the Revised Reports.

*The A. B. C. County Court Practice.* By H. I. TEBBS. London: Butterworth & Co. 1907.—This is a digest of County Court practice alphabetically arranged, so that the book is its own Index. We think that such a work may be of considerable value, but to compete with the existing manuals it should be compiled with great care, and cross-references should be frequent. We have been unable to find any mention of the rule as to costs in an action of contract remitted from the High Court which might have been begun in the County Court. A book of this sort is capable of vast improvement in later editions, and doubtless Mr. Tebbs will see his way to make it. The second part of the book contains the County Court Rules, and a useful digest of the Practice under the Workmen's Compensation Act 1906.

*Oddities of the Law.* By N. A. HEYWOOD. London: John Ouseley. 1907.—We cannot think that the title of this book is happily chosen. One would naturally expect to read of the inconsistencies of our legal system: whereas the book is a series of articles on obsolete crimes and punishments. Such as they are, they are not uninteresting, although slight in volume and a little "slangy" in style. Among the matters discussed are "The Death Sentence," "Villeins," "The Military Duel," "Witches," "The Pillory" and "Benefit of Clergy." We think the Author might have done better to have taken fewer subjects and treated each more fully.

*Paterson's Practical Statutes, 1907.* By J. S. COTTON. London: Horace Cox. 1907.—Fifty-six statutes were passed in 1907. Of these the most important were the Territorial and Reserve Forces Act; the Criminal Appeal Act; the Limited Partnership Act; the Vaccination Act; the Deceased Wife's Sister's Marriage Act, and the Small Holdings and Allotments Act. Many others, such as the Butter and Margarine Act, and the Patents and Designs Act may make food for lawyers. This excellent annual contains the text of all the new measures, as well as Tables of Principal Enactments Repealed and Subjects Altered, a list of Local and Personal Acts, and an exhaustive Index. It is an invaluable book of reference.

*The Law of Money-Lenders and Borrowers.* By C. G. ALABASTER. London: Stevens & Sons. 1908.—In his Preface the Author quotes a judge as saying of the Moneylenders Act that “there had been only one judge who could have, to the satisfaction of anyone, understood this statute; that was King Solomon. If there ever was another it was, he thought, Sancho Panza.” Apologising for his inability to come up to this standard, the Author claims to have collected all the reported cases on the Act, and to have extracted general rules therefrom. There is an Introduction explaining the origin of the Act; the text is then given, and the Author deals with the whole subject in detail. Registration of Money-lenders, Money-lending Transactions with Infants, Relief from Excessive Charges and Unconscionable Transactions, Relief given in Equity, and Sureties—all these matters are adequately discussed. The Case-law appears complete, and there are useful Appendices. One of these has the Report of the Select Committee on Money-lending (1898), and another a Glossary of Terms. The Table of Cases and the Index leave nothing to be desired.

**Third Edition.** *A Handbook for Public Meetings.* By G. F. CHAMBERS, F.R.A.S. London: Stevens & Sons. 1907.—The book is somewhat ambitious in its scope: it purports to deal with the summoning and management of meetings, the duties of chairmen and other officials and the rules of debate, and to contain “much information useful to the clergy . . . Local Authorities and Public Companies,” besides which it has a digest of cases. The Author claims long experience in the management of meetings, and so long as he confines himself to their technical conduct, the proper order for putting amendments, &c., and the legal points connected with meetings, his work is useful enough. But when he proceeds to counsel chairmen and speakers, and to furnish recipes for the extinguishing of “bores,” disturbers and other *ad hoc* nuisances, we think he is neither necessary nor convincing. The Author says that he has “adopted a style of writing which is rather concise and to the point than pleasant to the eye of a scholar.” Such a sentence as this “A chairman (when a ‘bore’ insists on speaking) must be good-tempered, self-possessed, courteous and sensible, but this is often pardonably difficult,” is surely both of dubious grammar and unsatisfying effect.

**Third Edition.** *Adulteration of Food.* By D. C. BARTLEY. London: Stevens & Sons. 1907.—This subject has of recent years figured constantly in the Courts: and two recent statutes have rendered necessary a new edition of this book. The Fertilisers and Feeding Stuffs Act 1906 prescribes the form of the invoice, creates the official sampler, and makes clear the question as to the *mens rea*. Under the Butter and Margarine Act (1907), butter and milk-blended butter factories are to be registered; the right of inspection of factories by the Board of Agriculture or the Local Government Board is established; the limit of moisture in butter and margarine is laid down, and there is a new definition of "margarine." These two Acts have been added to the book, which already contained all the statutes bearing on the subject. The work has been thoroughly revised. There is an excellent Table of Cases and a good Index, and all the necessary Forms seem to have been included. The book is strongly to be recommended.

**Third Edition.** *A New Guide to the Bar.* By "I.L.B." London: Sweet & Maxwell. 1907.—The ever-increasing number of those "called" at the four Inns of Court is a perpetual puzzle. Overstocked though the profession is, notorious as the "brieflessness" of the majority has become, nothing seems to damp the ardour of the would-be barrister until he has joined the ranks of the superior unemployed, and learns with equal futility to say "Don't" to the next generation. If the warnings of "I.L.B." in his first chapter, save here and there some too-confident youth, from wasting his talents on the most thankless and unremunerative of all careers, this book will have justified itself. There is nothing very new in his jeremiad, but the facts are truly stated and, to our mind, a convincing lecture is administered on the dangers of attempting to earn a living at the Bar. There are only two ways, says the Author, by which a satisfactory income can be obtained: firstly, by influence; secondly, by a miracle. The Author next describes the mode of admission to the Inns very thoroughly. Another chapter is devoted to practical advice to the newly "called." We cannot agree with the Author when he advises men to decide before "call" on what branch they will "specialise." The junior is forced to take what he can get, and "specialisation" should come later. The Appendices contain the Regulations, prospectuses of Lectures, and recent examination papers. The book is both interesting and useful.

**Fourth Edition.** *Wise on Riots and Unlawful Assemblies.* By A. H. BODKIN and L. W. KERSHAW. London: Butterworth & Co. 1907.—The branch of law discussed in this book is, on this side of the Irish Channel at all events, one rarely referred to in our Courts. "Hooliganism," however, is occasionally heard of, and in reading these pages we have been reminded of the duties of the public towards the police, and of the legal consequences of a refusal to aid them. In *R. v. Brown* (Car. & M. 314), a man was convicted for refusing to aid and assist in quelling a riot. We think that this law might be frequently enforced with salutary effect. Certain kindred matters here treated of, and the inclusion of recent legislation fringing on the subject, enhance the value of the book. Its object is, the Editors say, to point out the nature of the more aggravated offences against the peace; to explain the powers and liabilities of magistrates in the suppression of them, and to state the rights, duties and powers of private persons, constables and military. The six parts of the book deal severally with Riots at Common law and Statutory Riots; the Riot Act; Suppression of Riots; the Treason Felony Act 1848; the Riot (Damages) Act 1886; and Conspiracy and Protection of Property Act 1875, and the Trade Disputes Act 1906. That the Case-law, which necessarily comprises many very old cases, has been brought thoroughly to date, is clear from the inclusion of *Field v. Metropolitan Police Receiver* (*Times*, 30th July, 1907), in which Phillimore and Bray, JJ., laid down the five elements of a riot. The book is altogether an excellent one.

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## CONTEMPORARY FOREIGN LITERATURE.

*La Substance des Obligations dans le Droit International Privé.* Tome I. By D. JOSEPHUS JITTA, Professeur à l'Université d'Amsterdam. La Haye: Librairie Belinfante Frères. 1906.

Professor Jitta is known as an original and able thinker. In the two volumes on Obligation in Private International law, of which this is the first, he develops a theory on this difficult subject which very possibly approximates closely to the truth. He points out that the theory of the substance of obligations has been little regarded in comparison with questions of status, capacity, and universal succession; and he deals in the present volume with the neglected topic of contractual obligation. Professor Jitta surveys the work of his predecessors, and he sees that



it is mutually destructive. To reverse the saying of Leibnitz, each is mistaken in what he affirms, and right in what he denies. Each, in setting up one universal criterion of the proper law of a contract, is contradicted by the unanimous criticism of the rest. In face of these facts, Professor Jitta adopts an attitude of frank eclecticism. He realises that no single rule is sufficient. To a certain extent, but with a bias in favour of the law of the defendant's domicile, the same path has been found by Von Bar. And we may in Great Britain congratulate ourselves that it is practically the same as that on which our own Courts have entered. For, according to Westlake, the law applicable to a contract is in England simply the law of the country with which the particular transaction has the most real connection. It then becomes necessary to examine carefully the different kinds of contracts, and to assign each its particular criterion. This Dr. Jitta does, most elaborately, and with a rich (and accurate) store of illustration from the laws of various countries. Incidentally, we have met with few works in which the spirit and effect of English laws have been so completely and justly appreciated by a foreign writer. The prime touchstone which Dr. Jitta employs in each case examined is the extent to which the transaction in question penetrates into the active social life of a given country. If it penetrates completely into that of the *forum*, it is a "national-local" transaction, and no foreign law can be competent. If into that of a foreign country, it is a "foreign-local" transaction, and the law of the country in question should be applied. If, however, it fulfils neither requisite, it is an "international" transaction, and falls to be governed by something which, at first sight at all events, is very like the Roman *jus gentium*. For the Author holds that in such a case—*e. g.*, that of a contract made by A. in Paris with B. in Perth for the delivery of coals in China—the contract is valid, not by any national law or laws, but by the fact that a substratum of law common to all civilized nations enforces the fulfilment of contracts.

We think that the idea will grow in force. Professor Jitta puts it forward with all the fascination of a graceful style, reminding the reader of the familiar and ever-charming *Instituts* of Ortolan. He has performed the feat of producing a book on the most obscure branch of legal study, which is actually readable and luminous. Its careful perusal may be heartily recommended.

T. B.

*Du Régime des Capitulations en Turquie par Rapport à la Bulgarie.* By A. CALER, *Docteur en Droit*. Geneva : N. D.

This is a historical sketch of the capitulations or *Abd-Namé* affecting Bulgaria. Originally they constituted a *minutio majestatis* of Ottoman sovereignty. But to some extent they still exist in Bulgaria to the diminution of the sovereignty of that State. The relics of its old semi-sovereign position have survived the Treaty of Berlin, especially in procedure where a foreigner is a party. These relics should, M. Caleb thinks, be decently buried, as Bulgaria's conduct and progress have been such as to admit her on terms of equality into the European circle.

*Lehrbuch des gewerblichen Rechtsschutzes.* By Prof. Dr. A. OSTERRIETH. Leipsic : 1908.

The occasion of the publication of this work is no doubt the Congress on the Legal Protection of Industry which held a session at Düsseldorf in September last year. Dr. Osterrieth gives a history of the laws of the principal countries of the world relating to patents for inventions and the protection of trade-marks and trade names. In his English law he is good in his history—*e.g.*, he cites *Darcy v. Allain*—but is not quite accurate in his modern law, as he regards the Act of 1883 as the last word on the subject. It is remarkable how the Statute of Monopolies (21 Jac. I, c. 3) has served as the basis of the law of the world, for in the protection given to skilled invention by brain and hand England led the way. Göthe put the case for the outmanœuvred Germany of the day when he said that England adopted German discoveries, passed them off as her own, and patented them. He would not have needed to say so now.

*L'Impossibilità della Prestazione.* By Prof. M. R. BARBERIS. Milan : 1907.—A short essay on the impossibility of performance of an obligation without default of the debtor. It is mainly a comparison of the clauses on the subject in various European and American codes.

#### PERIODICALS.

*Journal du Droit International Privé.* Nos. VII—X. Paris : 1907.—This periodical, under the able conduct of M. Edouard Clunet, of course keeps up its high character as the leading periodical on the subject. Mr. W. F. Craies examines the cases of extradition arising in England, Canada and India from 1904 to 1906. In 1905

there were 65 applications to the British Government in 36 of which extradition orders were made (p. 965). At p. 1052 will be found a form of *commission rogatoire* addressed by the King's Bench Division to the Paris Court of Appeal, only the fourth instance, it is said, in 35 years. An important decision is noted at p. 1067, given by the Civil Tribunal of the Seine, that a French patent will expire when a foreign patent of the same article expires, even though the French term be legally longer (*Thomson-Houston Co. v. Westinghouse Co.*, 17 May, 1907). A French editor and translator of an English book (*America at Work*), is liable in damages to the author if without the author's knowledge and permission he insert a concluding chapter which is nothing more than an advertisement of an insurance company. It is an *attente portée à l'intégrité de son œuvre*. The *attente* was assessed by the Court at 1,000 francs (p. 1116). A curious case is reported at p. 1160. A Belgian and a foreigner (not English) executed in Belgium a contract in the English language, that being a common medium of communication. It was held that the English words must be interpreted in the *sens usuel* of ordinary Englishmen, not in the *sens tout spécial* of English lawyers or marine insurance experts (*Fokken v. Société Coloniale Anversoise*, 18 April, 1907).

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*Deutsche Juristen-Zeitung.* Berlin: 1 Oct.—15 Dec., 1907.—Professor Finger writes on the defects of the German law of libel, especially in a recent notorious case (p. 1217). Dr. Hagens comments on what he considers a contempt of Court committed by a certain English weekly review in an article dealing with the charges to Grand Juries by two English Judges on the Criminal Appeal Act (p. 1304). On p. 1337 is a portrait and a warm appreciation of Heinrich Dernburg. At p. 1343, President Kitz enlarges on the legal dangers of the newspaper paragraph, taking as his text Goethe's

*Der Paragraph, ist das der heil'ge Bronnen,  
Woraus ein Trunk den Durst auf ewig stillt?*

Dr. Hirschfeld reviews Prof. Holland's *Elements of Jurisprudence* (10th edition), with rather a leaning to the view that it is too English in structure, and excludes much that a German work of a similar nature would include, such as the law of nature, ethics, and the history of law. The *ungeheure Mannigfaltigkeit der Rechtsverhältnisse*, Dr. Hirschfeld admits, makes a complete work impossible, and English students will no doubt be glad that the limitations (*Selbstbeschränkung*) of the English text-book are not exceeded (p. 1191).

*L'Autorità giudiziaria ed i Delitti ministeriali. L'Illegalità dell'Accusa e dell'Arresto dell'On. Nasi, etc.* By GENNARO ESCOBEDO. Prato, 1907.—*La Giustizia Penale*. Rome: 27 Sept.—29 Nov., 1907.—Signor Escobedo's work is a reprint of articles which appeared in *La Giustizia Penale* last year on important constitutional points raised in a recent trial of Deputies to the Chamber on a charge of electoral corruption. The trial was by the Senate constituted a High Court of Justice for the occasion. Was this the proper tribunal? Assuming it to be so, could the accused be arrested before trial, and, if so, by whose order? Could the decision be reviewed on cassation? Should not the proceedings have been in the nature of an impeachment rather than of a trial? Could the Senate declare what was and what was not within the privilege of the Members of the Chamber of Deputies? Such are among the questions discussed. Some of them, apparently new to Italian jurists, we in England have settled some time ago.

The numbers of *La Giustizia Penale* contain many decisions of interest to students of one of the most scientific systems of continental Europe. The crime of violence against the liberty of industry is committed by threats of evil to be inflicted by a person other than the accused (p. 1368). In a prosecution for selling adulterated wine, a society of wine growers, one of the objects of which is to preserve the genuineness of the local wine, is admissible as *parte civile* (p. 1398). A judgment is not bad because a judge repeats a judgment delivered by him in a previous case on similar facts (p. 1409). Perjury can be assigned only before the Court of the district where the original trial was held (p. 1638). The offence of exporting antiques and works of art may be committed by an ecclesiastical corporation—in this case the bishop and the canons of a cathedral—and the articles need not have been registered in the official catalogue compiled in pursuance of the law of 1902 (p. 1657).

JAMES WILLIAMS.

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#### WORKS OF REFERENCE.

*The Lawyer's Remembrancer and Pocket Book, 1908.* By ARTHUR POWELL, K.C. London: Butterworth & Co.—Mr. Powell's useful little work has now reached its eleventh year, and has taken a well-deserved place amongst the regular legal "annuals." The present issue retains the form of its predecessors, and a glance through its contents goes to show that the book has been carefully

revised, and that new Acts passed during the last Session, and new Rules, have been duly noted. Some useful notes on the Dismissal of Servants have been inserted at the end of the book.

*Fry's Royal Guide to the London Charities.* Edited by JOHN LANE. London: Chatto & Windus. 1908. The present, the forty-fourth, edition of this handy work, maintains the high standard of excellence of former ones: and the form and scope of the book must be so well known that any detailed notice from us would be superfluous. *Fry's Royal Guide* is an invaluable work of its kind, and should be of service to solicitors and others who may be called upon to advise or assist in the bestowal of charitable gifts.

*Sweet & Maxwell's Diary for Lawyers, 1908.* Edited by F. A. STRINGER and J. JOHNSTON.—We have received the new issue of this excellent Diary, which appears to have been revised and brought up to date with that care which has always characterised the work of its Editors. All important alterations and additions have been made, and the work well maintains its reputation for clearness and accuracy. The diary space is ample and the paper excellent, and the various registers at the end of the book will be found extremely useful.

Books received, reviews of which have been held over owing to pressure on space:—Temperley and Moore's *Merchant Shipping Acts; The Laws of England, Vol I; Wang's German Civil Code; Harrison's Index to Reports of Income Tax Cases; Whitehouse and Vasey's The Companies Act 1907 and the Limited Partnerships Act 1907; Carr's Collective Ownership; Hemmatt's The Companies Act 1907; Bala Singham's Law of Persons and Things; Drewitt's Bombay in the Days of George II; Bousfield's Weights and Measures Acts; Palmer's Company Precedents, Part III; Topham's Company Law; Woods and Ritchie's Digest of Cases Over-ruled; Anson's Law and Custom of the Constitution, Vol. II, Part I; Every Man's Own Lawyer.*

Other publications received:—*The Humane Review; Rubinstein's The Land Registry Fiasco; Reports of the American Bar Association, Vol. 32; Schaffner's Initiative and Referendum and The Recall* (Wisconsin Library Commission).

NOTE.—*The Relationship of Landlord and Tenant.* By EDGAR FOA. Inadvertently in our November number the publishers of this well-known work were stated to be Stevens & Sons. The book is published by Stevens & Haynes, 13, Bell Yard.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review, Law Times, Law Journal, Justice of the Peace, Law Quarterly Review, Irish Law Times, Australian Law Times, Canada Law Journal, Canada Law Times, Chicago Legal News, American Law Review, American Law Register, Harvard Law Review, Case and Comment, Green Bag, Madras Law Journal, Calcutta Weekly Notes, Law Notes, Law Students' Journal, Bombay Law Reporter, Medico-Legal Journal, Indian Review, Kathiawar Law Reports, The Lawyer (India), South African Law Journal.*

# THE LAW MAGAZINE AND REVIEW.

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No. CCCXLVIII.—MAY, 1908.

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## I.—CRIMINALS AND CRIME.

IN inviting me to reply to "Lex's" article on my book, *Criminals and Crime*, in this Review, the Editor has placed me in a difficulty. When I responded to his courteous letter I had given but a hurried glance at the article in question. But on sitting down to study it I recognise that it is answered in anticipation, not only by my February article in the *Nineteenth Century*, but still more effectively by Sir Alfred Wills' article in the December number of that Review. It is not easy therefore to say anything new, and I cannot expect the Editor to allow me to reproduce in these pages what has already appeared elsewhere.

"Lex" criticises the method, or want of method, of my book. I myself have done the same. But he ignores my explanation of this defect. When I broached these subjects seven years ago, Mr. Justice Wills and I knew each other only as public men. To use his own words, he had "the barest possible acquaintance" with me. But so impressed was he with the importance and practical value of my scheme, that he identified himself with it in a letter to the *Times*. I afterwards learned from others of the Judges that he had brought the subject before them collectively, and I learned also that in such matters he was regarded as the

Nestor of the Bench. Under his influence they made representations to the Home Office, which resulted in the introduction of the Bill of 1903, to give effect to certain parts of my scheme.

In these circumstances, when I came to write my book, I recognised the importance of reproducing Sir Alfred Wills' letter, and this involved the reproduction also of the article on which it was based. It was impressed on me, moreover, by competent advisers, that what was then needed was to educate public opinion on the subject. All this led me to write in a popular vein, and I have received proof that my book has been a marked success. As "Lex" himself acknowledges, "it has attracted more attention than other writings on the subject."

Many things in his article suggest that he has not much practical acquaintance with his subject. And not a little of it gives proof that he has paid but scant attention to the book he is ostensibly reviewing. For example, it does not need a treatise from my pen to prove that the labour of long-sentence prisoners can be made remunerative. Any prison official could vouch for that. Then again he refers to page 57 of my book in proof that I am vague, if not incoherent, in my definition of professional criminals. But this is due solely to his not understanding the distinction between the "habitual" criminal and the "professional." I cannot do better than state this in Sir Alfred Wills' words:—"Sir Robert Anderson points out that there are two kinds of prisoners for whom very long periods of detention ought to be provided. 'There are those,' he says, 'who are so utterly weak or so hopelessly wicked that they cannot abstain from crime, and there are others who pursue a career of crime with full appreciation of its risks.' Criminals of both classes are 'habitual,' but only one of them should be considered 'professional.'"

I may here remark in passing that "Lex" seems to

regard Sir Alfred Wills as altogether undeserving of notice; for his paper gives proof that he has not thought it worth while even to read the article from which the above is quoted.

Then, again, a similar remark applies to his laboured attempt to prove that my references to punishment on pages 140-1 are inconsistent. I am really unable to make more clear what I should have thought any intelligent reader would understand. On the one page I refer expressly to certain special cases in which "a humane Judge" desires, not the punishment of an offender, but his reformation, and I notice that his desire is thwarted by our present methods. And I then proceed to urge that "every committal should be with some definite and desirable object"; whether it be the prisoner's punishment, or his reformation, or merely his detention, or some combination of these. But "Lex" deems this inconsistent with my thesis that punishment should be regarded merely as a means to an end. The seeming incoherency however is not in my words, but in his own thoughts. He sits down to table with the definite object of eating his dinner. But he eats his dinner, I hope, merely as a means to an end. So here a judge may send an offender to gaol in order to punish him. But if he be intelligent he regards the punishment as a means to an end, namely, the good of the community.

In this connection another of "Lex's" criticisms claims notice. He sees an inconsistency in my proposing the permanent seclusion of certain offenders in asylum prisons, and yet making them suffer a preliminary course of penal discipline. But I am not a visionary. "Lex's" article itself gives absolute proof that my scheme raises clouds of prejudice; but I have no intention of running tilt against a stone wall. Many offenders might properly be committed at once to an asylum prison, but the public would not tolerate our dealing in this way with criminals who deserve



hanging. Moreover, even the Humanitarian League recognises that crime can be suppressed by severity of punishment. In its desire to refute the prevailing belief that flogging put an end to garotting, it has proclaimed upon the housetops that that result was in fact brought about by penal servitude sentences of drastic severity imposed on all who were convicted of the crime. There is no doubt that the same means would be equally effective in the case of other kinds of deliberate crime. But though the judges recognise this, they find practical difficulty in acting on it. What Sir Alfred Wills has written on this point makes it unnecessary for me to enlarge upon it.

But everybody will recognise that if a vicious dog is shut up in a yard, he will not bite us as we pass along the highway; and if a burglar is safely caged, he will not "crack our cribs." And the transfer of a convicted burglar to an asylum prison is proposed as an alternative, not to his being kept in penal servitude, but to his being allowed to resume the practice of his profession.

The essence of my scheme might be described as a proposal to introduce into our criminology two of the main characteristics of the Divine code of the Theocracy. The first of these is the distinction between deliberate crimes and chance crimes, or crimes due to sudden temptation or other accidental circumstances. I have illustrated this by giving particulars of a crime of which I was myself the victim five-and-twenty years ago. The criminals included one of my household servants; and I narrated how, thanks to my intervention, she escaped punishment, although, according to our present system of "fitting the punishment to the sin," she ought to have received the severest sentence. "Lex's" desire to close his article by a telling sneer at my expense has betrayed him into a double blunder, both in the facts and in the law. His reference to the First Offenders Act is a strange anachronism, And it was because

the woman was absolutely ignorant as to the disposition of the stolen property that I was able to influence the judge in her favour.

The other feature of the Jewish law for which I claim prominence is the consideration shown to the victims of crime. An offender was required to make restitution to the citizen aggrieved by his wrongful act. This is in "Lex's" view the worst element in my scheme. And he frames a set of conundrums which he supposes to be fatal to it. Some of these will be solved for him by any one who has practical acquaintance with prison administration. Others are easily answered. He urges that there are cases in which my proposal would be inapplicable. A similar objection applies to every proposal that could possibly be framed in any sphere of human affairs. But he demands, "Where is the justice of requiring compensation from a man who steals my horse, but not from a man who maliciously kills it?" I will deal with that question when the principle has been recognised in the sphere to which my book relates. He adds, "If the man who kills my horse should be compelled to make compensation, why not also the man who deprives me of an eye or lames me for life?" Why not? we may well ask. In these respects our law is infamous. The rich man who suffers from an outrage may assert his rights by an action at law. But in the case of the toiling millions, the victim of a wanton and dastardly crime, that possibly maims him for life, is absolutely without redress.

"Lex's" "Why not?" can be turned the other way. I commend to his attention the following passage from Sir Alfred Wills' article on my book:—

"An interesting and quite original part of Sir Robert Anderson's treatise deals with the subject of restitution by the thief. It is of most importance with reference to the great robberies of which we have heard so much lately, the work of the strictly 'professionals,' but is of great weight as

to smaller thefts also—as to all, in fact, where the receiver of stolen goods comes in. At present a man who has been robbed of property worth, perhaps, thousands of pounds, gets no help in the way of restitution from the Court which tries the offender unless the property is in the hands of some known person, in which case certain very limited powers to order restitution are conferred upon the Court; but let the thief be never so wealthy, there is no power to order him to pay the value of what he has made away with to the owner. Sir Robert Anderson proposes that after conviction the thief shall be called upon to say what he did with the property, and in case of refusal to do so should be liable to imprisonment for life. Why not? Where would be the injustice? As in nine cases out of ten the property has been disposed of to a receiver, a serious, perhaps a mortal blow, would be struck at the receiver, and an element of distrust between thief and receiver would be created which could not fail to be of service to the community.”

Upon this branch of the subject, my only further reply to “Lex” will be to appeal to any impartial person to read Chapter X of my book and his criticisms upon it, and then to judge between us. Let me take one point, *ex. gr.* I maintain that “restitution should be the rule in every case of wilful crime.” And this he meets by enumerating exceptional cases to which such a rule would not apply! Among those exceptional cases, moreover, he specifies, as instances of “wilful crime,” an act done by a weak-minded person, or by “a thoughtless boy”! Am I expected to answer criticisms of that kind?

And when he asserts that my references to the *Beck Case* are “utterly and absolutely wrong,” I am content to maintain what I have said, and to leave the public to judge between us. Macaulay remarks somewhere that the Scotch are liable to delusions: one of my delusions is that I know a good deal about the *Beck Case*.

The best answer to "Lex's" criticisms would be a re-statement of my scheme. But here I must refer to my book. I arraign our present punishment-of-crime system as being false in principle and mischievous in practice. It is a trivial offence to steal a shilling, but to steal £1,000 is a serious crime. And yet the petty theft may be in fact a final proof that the offender is an incorrigible criminal, whereas the "serious crime" may be the first lapse in a good life, due to deep need and strong temptation. The shilling thief may deserve the gallows, and the thousand-pounder may be worthy of pity and help. But, it will be said all this is recognised at present. I answer, Yes, in a sense, and in a measure; but the law does not sanction the recognition given to it and it makes no provision for such an inquiry as would make the recognition both just and safe. The result is that the weak and erring suffer, and the wicked escape. My contention is that an offender's character and career should be ascertained by open and fair inquiry, and that if he is proved to be an outlaw he should be treated as an outlaw. An impenitent thief deserves no pity; and if there be a trace of penitence it will show itself in a desire to make amends for the crime committed. "What have you done with the stolen property?" should be demanded of every one who is convicted of feloniously appropriating that which is his neighbour's; and if he refuses to speak, there ought to be but one sentence for him. "Why not? Where would be the injustice?" Sir Alfred Wills asks, and the question remains unanswered. And if to this were added the enforcement of compensation to the victim of crime in all cases where it is practicable, we should have very few crimes against property, save by persons who are hopelessly weak or recklessly wicked. Offenders of both classes might be taught, under suitable restraint, to lead useful and not unhappy lives: and we should be done with the great army of the "short sentence prisoners" who are the despair of both the criminologist and the true philanthropist.

So long as human nature remains unchanged crime will never be eradicated. But the great mass of crime which now disgraces our civilisation is the product of our present stupid and evil system of dealing with criminals. And when the reasonable reforms which I advocate are adopted, as they certainly will be, the diminution of crime will be rapid and continuous.

ROBERT ANDERSON.

## II.—THE LAW OF THE UNIVERSITIES.

### I. GENERAL.

A UNIVERSITY has been defined in more than one way. The English statutes and reports contain no definition. It will be necessary to accept definitions by non-legal writers. These do not agree, but the tendency is the same. The earliest is perhaps that of the *Siete Partidas*, ii, 31 (13th cent.), *estudio es ayuntamiento de maestros e de escolares que es fecho en algund lugar con voluntad e entendimiento de aprender los saberes*. Brissonius says *universitates appellantur collegia et corpora*.<sup>1</sup> Calvinus simply copies this.<sup>2</sup> Du Cange does not help much by defining as *academia publica*. Cardinal Newman attempts a definition which may meet the case of a modern university if it possess all the faculties, but is too broad for the Paris and Bologna of the middle ages. It is "a place of teaching universal knowledge."<sup>3</sup> Dr. Rashdall confines himself to telling us what a university is not. The statement of the *Siete Partidas* is useful as directing attention to the three stages through which most ancient universities seem to have passed. Oxford and Cambridge were not originally corporations. They began as *scholae* or *studia particularia*, fortuitous ga-

<sup>1</sup> *De Verborum Significatione* (1596).

<sup>2</sup> *Lex Juridicum* (1684).

<sup>3</sup> *The Idea of a University*, p. 1.

therings of teachers and students in a suitable place. The next stage was the *studium generale*, *commune* or *universale*,<sup>1</sup> a guild of masters or doctors with control over the admission by degree to their own body. The latest and present stage is the *universitas* or *universitas studii* or *universitas studentium* or *scholarium*, a corporate existence with well-defined constitution and privileges, Bologna being specially *alma studiorum mater*. There is perhaps a sense of locality in *studium* which is wanting in *universitas*. It is perhaps not an accident that *universitas* began to develop out of *studium* just about the time when Innocent IV created the modern corporation as a fictitious person, especially the corporation sole, from Roman law elements.<sup>2</sup> This was about 1238; the term was used of Paris in 1209, of Oxford in 1230. It has been used of the Inns of Court, both Fortescue and Selden calling them universities for the study of law.<sup>3</sup> In some cases *universitas* might mean a faculty within the university,

<sup>1</sup> The use of *studium* in the *Corpus Juris Civilis* is, like the use of *universitas*, analogous but not synonymous. *Universitas* signifies a group or combination of rights and duties, then transferred to a group or combination of persons invested with rights and duties, something approaching, but not co-extensive with, the modern corporation. In Bracton (171b), the King is *universitas regni*. In Dante (*De Mon.*, i, 9), *universitas humana* seems to mean human nature as a whole. In some medieval charters and bulls *universitas*, or *universitas vestra*, has the signification of *universi in Christo fideles*. The Bull of 1318 (see below) calls the graduates of Cambridge *universitas*. In the Theodosian Code, but not in Justinian, *studium* approaches its medieval sense. In xiv, 1, 1, *liberalia studia* occurs; in xiii, 3, 5, *magistri studiorum*; and in xiii, 4, 1, architecture is a *studium*. The *studium facultatum* of xiv, 3, 4, seems promising at first sight, but it really means desire of wealth.

<sup>2</sup> Maitland's Gierke (1900), p. xix. A college is a *persona*, *Case of Magdalen College* [1665], 1 Mod. 163.

<sup>3</sup> In some respects they are still parallel. No authority can compel an Inn of Court to admit a person as a member, just as no authority can compel admission of a commoner to a college or university. An Inn of Court cannot be compelled to call to the Bar just as a university cannot be compelled to admit to a degree (*R. v. Gray's Inn* [1780], Douglas, 339). But in the former case there is an appeal to the Judges as quasi-visitors, in the latter there seems to be no appeal. The Inns of Court bear a certain resemblance to the Oxford halls. An important difference is that they have no written constitutions like the *Statuta Aularia*.

*e.g.*, *universitas professorum juris canonici*, a phrase which reminds of Doctors' Commons before 1858. Lyndwood uses the phrase *universitas studentium*. Cambridge has always preferred *academia* to *universitas*; the official volume of statutes is called *Statuta Academia Cantabrigiensis*. With the right of *studium generale* usually followed that of *jus ubique docendi*, and there is no doubt that the medieval student wandered for his lectures much more than does his modern representative, *e.g.*, the oldest statutes of Peterhouse contemplate the possibility of scholars of that college studying at Oxford. As time went on, *jus ubique docendi* was conferred by grant of Monarch or Pope, but in its origin must have rested on general acquiescence. There appear to be three types of universities,—that of students, as Bologna; that of masters, as Paris and Oxford; and that of Crown grant or Papal bull, such as the Spanish and Scottish.

As to colleges, the phrase *collegium* has had a somewhat similar history. It is a technical term of Civil and Canon law. Originally it denoted a guild or combination of persons, military or civil, at least three in number at its formation,<sup>1</sup> the corporation sole, such as the Chancellor of the university, being a canonist refinement. The members of a *collegium* were *sodales* or *collegae*, and its by-laws were *leges*. These *collegia* at Constantinople were mostly trade-guilds.<sup>2</sup> It was not till later that they tended to become primarily confined to educational bodies.<sup>3</sup> There still exist non-educational colleges, such as the College of Justice in Scotland, the College of Arms, the Morden College, and some ecclesiastical corporations like the College of Manchester.<sup>4</sup> But all alike *ex vi termini* import

<sup>1</sup> See the opinion of Neratius in *Dig.*, l, 16, 85.

<sup>2</sup> It is remarkable that in *Dig.*, iii, 4, 1, *universitas* and *collegium* appear to be used synonymously.

<sup>3</sup> Some schools are colleges, such as Eton and Dulwich.

<sup>4</sup> See 2 Geo. II, c. 29. Bodin calls the House of Commons a *collegium*.

a corporation at the present day.<sup>1</sup> Some of the writers who have declined to define university have been less cautious as to college. Jenkins defines it as *societas plurium corporum simul habitantium*.<sup>2</sup> With Calvinus *collegium, corpus, universitas, conventus idem sæpe significant*. The definition given in the *New English Dictionary* is "A society of scholars incorporated within or in connection with a university, or otherwise formed for the purposes of study and instruction." Sect. 15 of the Universities of Oxford and Cambridge Act, 1877, regards both a university and a college as places of "education, religion, learning, and research." Sect. 24 of the Education Act, 1902, includes under college "any educational institution." Jenkins' definition and that of the Act appear to be too extensive, as it would include the old Oxford halls, formed by voluntary coalescence of students who chose their own head. Sometimes they were erected into colleges, like Broadgates and Gloucester Halls; sometimes the colleges absorbed them, as in the case of Magdalen Hall and St. Alban Hall. The only one surviving is St. Edmund Hall; Wycliffe and Ridley Halls are not halls in this sense. In their history the *hospicia* of Paris were parallel, except that at Paris the colleges have become extinct as well as the halls.<sup>3</sup> A college may exist by reputation,<sup>3</sup> and so no doubt may a university. In a return to a mandamus Oxford or Cambridge returns itself as existing by prescription.<sup>4</sup>

<sup>1</sup> *Phillips v. Bury* ([1747], 2 T. R. 353). Probably no head of a house is at the present day a corporation sole, but it seems probable from the report that in 1614 the Provost of Queen's, Oxford, was so, *Dr. Ayraye's Case*, 11 Rep. 18. A Crown grant might still make him so, Grant, 543.

<sup>2</sup> Relics of the collegiate system still exist on the Continent. There is the College of Spain at Bologna, and the Colleges of Salamanca and Valladolid are mentioned by José Isla in *Fray Gerundio*, i, 1.

<sup>3</sup> *Adams and Lambert's Case* ([1602], 4 Rep. 106). The word *domus* sometimes occurs in college statutes as equivalent to *collegium*, and denoting something more than the mere building. See, for instance, the old statutes of Peterhouse as set out in the report of *R. v. Bishop of Ely* ([1788], 2 T. R. 290).

<sup>4</sup> *R. v. Chancellor of Cambridge* ([1723], 2 Strange, 557).



It is impossible to fix any date, as can be done in the case of the Scottish and later English universities, at which Oxford and Cambridge began to be universities. The legends of Arviragus,<sup>1</sup> Arthur and Alfred were the creations of the same habit of mind which produced the forged bull of Honorius of 624 and attributed the foundation of Bologna to Theodosius II and of Paris to Charles the Great. We are not on firm ground until the thirteenth century. It is a hypothesis more than probable that Oxford arose from direct migration from Paris in 1167, and Cambridge in the same way from Oxford in 1209. The earliest reported case in the authorised reports is in 1292, the earliest statute in 1413. The earliest university statute is in 1252. The college system, implying corporate self-government, the distinguishing feature of Oxford and Cambridge, became fully established after the foundation of Merton. In England the faculties had no corporate existence, as at Paris. Few medieval universities had the four faculties in full.<sup>2</sup> The statutes of Merton, framed in 1274 and confirmed by Papal bull in 1281, became the model on which those of most other colleges were based.<sup>3</sup> Like other original statutes they were framed by the founder,<sup>4</sup> whether the Crown, a private person, or a guild, as in the case of Corpus, Cambridge. Statutes were confirmed or altered from time to time by the authority of the Pope or his

<sup>1</sup> Prynn makes the date of the foundation of Oxford by Arviragus, A. D. 70.

<sup>2</sup> The mnemonic lines as to the faculties were :—

*Hic florent artes, caelestis pagina regnat,  
Stant leges, lucet jus, medicina viget.*

<sup>3</sup> New College statutes formed another model, and there is judicial authority that the statutes of King's were borrowed from them. *Case of Commendams* ([1612], Sir J. Davis, 68). The earliest Cambridge college statutes were those of Michaelhouse (1324), now merged in Trinity. Merton statutes made no provision for tuition in the modern sense ; that came with New College.

<sup>4</sup> It appears from *R. v. Dulwich College* ([1851], 21 L. J., Q. B. 36), that the founder may, by the instrument of foundation or the Statutes, give a vote to non-members of a corporation to vote in the election of a corporate officer, in this case the warden.

legate,<sup>1</sup> the Crown,<sup>2</sup> or parliamentary,<sup>3</sup> university and college legislation. The Courts have no jurisdiction to do anything in the nature of imposing new statutes by an amending scheme. College statutes were earlier in date than statutes of the realm dealing with the same subject, and, imperfect as they sometimes were, honestly attempted to make a college a place of learning.<sup>4</sup> The earliest statute of the realm is 1 Hen. V, c. 8 (1413), by which all Irishmen and Irish clerks, beggars called chamberdeacons (probably the "hedge-priests" of later times), except graduates in the schools and certain others, are to be voided out of the realm. This was repealed for England in 1863 and for Ireland in 1872. A little later, 9 Hen. V, c. 8 (repealed in 1863), forbade scholars at Oxford to hunt by night. A curious Act is 1 Hen. VI, c. 3 (also repealed in 1863), the preamble of which states that Irish students came to Oxford and resided there *a grande peure de tout manere people demourant la environ*. The Act then goes on to provide that scholars of Ireland dwelling in England must find security

<sup>1</sup> Bulls usually exempted universities from episcopal visitation and granted the *jus ubique docendi*. They sometimes conferred degrees; a relic of the Papal degree is the "Lambeth" degree still conferred by the Archbishop of Canterbury, who before the Reformation was *legatus natus*. A bull of John XXII in 1318 recognised Cambridge as *studium generale*, and one of Martin V in 1430 confirmed its privileges. The bull of Boniface IX, exempting Oxford from the visitation of the Archbishop of Canterbury, was declared invalid by Parliament in 1441 (Griffiths, 1). Of bulls dealing with colleges, examples are those of 1364 for Balliol and 1398 for New College. A legatine sentence of 1214 as to Oxford is interesting as containing the basis of future immunity (1 Wood, 184). Few of the bulls deal with education. Wood mentions one of Innocent IV to Bishop Grosseteste in 1246, enjoining Oxford to permit none to teach *nisi secundum morem Parisiensem*. One of the popes (Alexander V) was a B.D. of Oxford. Decretals, i, 38, 8, allowed a *universitas scholarium* to appear by *procurator*.

<sup>2</sup> As by the injunctions of 1535 and by the statutes of University College, framed in 1736, after a disputed election to the Mastership in 1726.

<sup>3</sup> As by the Oxford University Statutes Act, 1869 (repealed 1883), confirming certain university statutes of doubtful validity.

<sup>4</sup> The dictum of Yates, J., is surely wrong: "Improvement in learning was no part of the thoughts or attention of our ancestors" (*Millar v. Taylor*, 4 Burr. 2387).

for good behaviour and bring testimonials from the Lieutenant of Ireland. The statute 3 Edw. IV, c. 5 (also repealed in 1863), exempts graduates of the universities from the sumptuary provisions of the Act as to apparel.

As fresh colleges were founded codes of statutes were framed, dealing, as did those of Merton, with endowment, government, education, and discipline. The only exception was Christ Church, the draft statutes of which were never adopted, and up to 1858 that college was governed by orders of the Dean and Chapter. The making of statutes depended on the inherent power of a corporation to make by-laws. The early statutes, both of universities and colleges, included very minute sumptuary laws, of which traces still remain. A statute of 1564 enacted that no fellow or scholar should wear a shirt of a certain size without embroidery of gold and silver. One of the Laudian statutes forbade undergraduates to hear cases in Courts of justice under pain of a fine and graduates *nisi ex causa rationabili*. In 1679 the Vice-Chancellor prohibited the sale of coffee on Sundays until after evening prayer. The original statutes of Queen's contained detailed regulations as to the strength and quality of the *potagium congruum et competens* supplied to the fellows. Tournaments, hounds, dice and chess, were forbidden by various statutes.<sup>1</sup> The statutes of the now dissolved Hertford discomfited any tradesman who allowed an undergraduate member of the college to obtain credit for more than five shillings. Licences to undergraduates to support themselves by begging in the vacations were also the subject of several statutes. Up to recent times there seems to have been considerable disregard of the statutes by the Crown, the Chancellor, and the colleges. Fellowships were bought and sold, and corrupt resignations were

<sup>1</sup> In spite of sumptuary provisions, degrees remained expensive for a long time, though the days are past when a candidate at Oxford gave a feast to his examiners, and inception at Salamanca meant paying for a bull-fight.

not unknown. The principal codes of university and college statutes before recent legislation were those promulgated for Cambridge in 1570 and for Oxford in 1636, the latter generally known as Archbishop Laud's. These codes, amended from time to time, were in force until superseded by the statutes framed under the parliamentary powers given to Oxford in 1854, to Cambridge in 1856.<sup>1</sup> Up to those dates it had been a common form that members of the governing bodies should swear that they would not be parties to altering the statutes of their respective foundations.<sup>2</sup> At present the statutes by which the universities and colleges are bound are those framed in accordance with the Oxford and Cambridge Universities Act 1877. To this there are three exceptions, Lincoln,<sup>3</sup> Hertford,<sup>4</sup> and Keble,<sup>5</sup> which are partly, though not entirely, unaffected by recent legislation. The new statutes of Oxford were published in 1882, of Cambridge in 1883. Since the powers of the commissioners under the Act of 1877 ceased in 1881, amending statutes have been framed from time to time by the colleges themselves, subject to the approval of the Crown in Council.

Colleges were originally founded in most cases for heads, fellows, and scholars. But Oriel, and perhaps others, had no scholars until recent times. The first donor is in law the founder.<sup>6</sup> The head and fellows are generally the governing body. Exceptions are Christ Church, Downing,

<sup>1</sup> The Oxford Commission of 1852 still thought it doubtful how far the University had power to alter the Laudian statutes. Report, p. 6.

<sup>2</sup> The Crown cannot pardon offences against statutes. *Bentley v. Bishop of Ely* ([1725], 2 Strange, 912).

<sup>3</sup> On 12th May, 1882, the then Bishop of Lincoln (Dr. Wordsworth), as visitor of the College, moved an address to the Crown praying that its assent might be withheld from the draft statutes. This was carried in the House of Lords (*Hansard*, cclxix, 529).

<sup>4</sup> Hertford is for the most part unaffected by the University Tests Act. See *R. v. Hertford College* ([1878], 3 Q. B. D. 693).

<sup>5</sup> Keble has no statutes in the proper sense of the word, though it may have regulations.

<sup>6</sup> *Sutton's Hospital (Charterhouse) Case* [1613], 10 Rep. 1.

and Keble.<sup>1</sup> At Christ Church the chapter has co-ordinate powers. At Downing certain professors are on the governing body. Keble has no fellows, their place is taken by a nominated council. The head is generally elected by the fellows, except in the cases of Christ Church and Trinity, Cambridge, both nominated by the Crown, Magdalene, nominated by the visitor, and Keble by the Council. The fellows are usually co-opted, except one at Lincoln appointed by the visitor. The admission of commoners and pensioners, not on the foundation, appears to have been of later date than that of scholars. New College, Magdalen, and Corpus, Oxford, had no commoners for centuries, and every resident member of All Souls is still on the foundation, besides some non-residents.

A university or college has a discretion as to whom it will admit. There appears to be no general right of admission, enforceable by mandamus or otherwise.<sup>2</sup> A university may refuse or deprive of a degree. Originally it was not the university which conferred the degree. The licence came from the Chancellor, the inception from the faculty.<sup>3</sup> But at present the university combines the licence and the inception. Bentley's deprivation in 1718 is the most famous case of deprivation. It has been exercised in modern times, for instance in the case of W. G. Ward at Oxford, and in 1896 of a Cambridge graduate who had been sentenced to penal servitude.<sup>4</sup> In

<sup>1</sup> Selwyn is only an apparent exception. Though called a college, it is technically a "public hostel." Mansfield and Manchester are post-graduate seminaries under the management of non-conformist bodies. So is Westminster at Cambridge.

<sup>2</sup> This appears to follow from the analogous case of an Inn of Court and is, in fact, assumed in the judgment in *R. v. Lincoln's Inn* ([1826], 4 B. & C. 855).

<sup>3</sup> 2 Rashdall, 446.

<sup>4</sup> According to one of the Bentley cases, deprivation or degradation must be for reasonable cause and after summons. A contempt of the Chancellor's Court is not reasonable cause. *R. v. Chancellor of Cambridge* ([1723], 2 Strange, 566). The remedy, where there is any, is mandamus. It also lies for expulsion of a graduate. Lord Mansfield in *R. v. Ashew* ([1657], 2 Burr. 186).

one Scottish<sup>1</sup> and one New York case<sup>2</sup> the Court refused to interfere; in a second New York case<sup>3</sup> it did interfere. The only English precedent is so old that it could hardly be considered an authority at the present day.<sup>4</sup> In 1559 and 1563 bills were introduced to make a degree a necessary condition for the appointment of an ecclesiastical judge. As far as advocates were concerned, this was practically the rule until Doctors' Commons ceased to exist. Most Admiralty and ecclesiastical judges were taken from the advocates and had graduated as D.C.L. or LL.D. In some cases degrees are necessary for ecclesiastical preferment.<sup>5</sup>

The granting of degrees is not the peculiar privilege of a university. St. David's College, Lampeter, has the privilege, and so (within limits) has the Archbishop of Canterbury.

JAMES WILLIAMS.

<sup>1</sup> *Johnston v. Glasgow University* (*Law Times*, 17th March, 1900), where Lord Stormonth Darling held that the University is justified in refusing the degree of M.A. to a student who had passed the examinations but not attended a sufficient number of classes.

<sup>2</sup> *People v. New York Homoeopathic Medical College* (20 N. Y. Suppl., 379), the Court refusing a mandamus to the College to issue a diploma which it had refused to the relator.

<sup>3</sup> The Supreme Court of New York held that a college had no right arbitrarily to refuse to examine a student for a degree, as there was an implied contract to grant the degree on the conditions being fulfilled. The Court would not review a definite reason alleged, but in this case there was an arbitrary refusal (*Law Journal*, 1891, 439). See a similar case at Paris (1 Rashdall, 470).

<sup>4</sup> In 1312 a mandamus issued to Cambridge to allow Robert Baketon to take his degree. Cited Sir T. Raymond, 109.

<sup>5</sup> See the *Bishop of Chester's Case* with relation to the Wardenship of Manchester (Oxford, 1721). The Ewelme Rectory Act, 1871, provided that the Crown can only appoint to that rectory a member of the Convocation of Oxford University, *i. e.*, one who is at least M.A. of that University.

### III.—THE MIDDLE TEMPLE LIBRARY.

**I**T was formerly the custom for members of one family to attach themselves to a particular Inn of Court, much in the same way as they do now to one of the great public schools. At the end of the sixteenth century the names of Carew, Montagu and Sandys, for example, will be found to occur constantly in the register of admissions to the Middle Temple. Among others who came to the Inn at that period were the three brothers Ashley, who belonged to a Wiltshire family. Anthony, the eldest, went through the course of study at the Middle Temple as part of a general education, supplemented by travel for the acquisition of foreign languages, to equip him for the service of the State. Some time before 1588 he was appointed Clerk to the Privy Council, and at their request undertook the translation of an important Dutch book on the art of navigation, entitled *The Mariner's Mirrour*. He was knighted in 1596, and was made a baronet in 1622. He succeeded to the estates, at Wimborne St. Giles, of the Dorsetshire Ashleys, and through his only child, Anne, became an ancestor of the Earls of Shaftesbury. Robert, the next brother, was fourteen years junior to Anthony. He proceeded so far in the study of the law as to be called to the Bar, but "finding the practice to have ebbes and tydes (as have fore the most part all other humane employments)," so he wrote in the *Advertisement to Almansor*, "I have stolne and snatched at vacant times some opportunities; what by Travaile, books and conference; to get some knowledge of forreigne countries, and vulgar languages: especially those of our neighbours (I meane the French and Dutch, the Spanish and Italian), that by the perusing of their writings, I might also bee made partaker of the wisdome of those nations . . . ." It was left to Francis, the youngest of the three brothers, to attain eminence in the practice of the law. He

was admitted to the Inn in 1589, the year following Robert's admission, was called to the Bar, and steadily rose in his profession. For some time he undertook Parliamentary duties as Member for the City of Dorchester, of which he was also Recorder. Having served the office of Reader at the Middle Temple, Francis Ashley was called to the degree of Serjeant, and knighted in 1618. He died in Serjeant's Inn in 1635.

It was not wholly the uncertainty of success which led to Robert Ashley's abandonment of the practice of the law, for his writings show that the bent of his mind was not in that direction. Nevertheless, he resided in the Inn and made it the head quarters from which to set out upon his journeys. Thus Ashley could watch the erection, under the direction of Edmund Plowden the Treasurer, of the fine new hall of the Middle Temple, and learn with interest of the confirmation in 1608, by James I, to the Inner Temple and Middle Temple of their ancient rights and privileges. Ashley outlived both his brothers and died in 1641 at the age of 76. He was buried in the Temple Church, and bequeathed his library<sup>1</sup> as an "acknowledgment of the love" he bore towards the Society of which, at his death, he was "one of the most ancient Masters of the Utter Bar." He thought that in the keeping of the Society his books, of which many were "not easily to be mett withall elsewhere," might "happily be usefull to some good spirittes" after him. It was his particular desire that, although for the especial use of members of the Middle Temple, they might be accessible to any "student, whether of oure owne or of any forraigne nation, that may be curious to see somewhat which he cannot so readily finde elsewhere." For the more effectual carrying out of his intention, Ashley bequeathed £300 to provide a yearly revenue for "the governour or library keeper," besides the furniture of his chamber.

<sup>1</sup> Ashley's will is printed in *The Middle Temple Records*, edited by C. H. Hopwood, K.C., 1904, Vol. II, p. 917.



It has been generally assumed that the Molyneux globes in the care of the Keeper of the Library formed part of Ashley's bequest, although there is no reference to them in the records of the Inn before the year 1717. They were published in 1592 at the expense of Mr. William Sanderson, a munificent City merchant interested in geographical discovery. The globes were the work of Emery Molyneux, a mathematician resident in Lambeth, and were printed by Hondius, the Dutch engraver. It is remarkable that this set should be the only one in existence, though its association with the Honourable Society is not so curious as some have considered, for there is evidence that several members were keenly interested in the colonising and exploring enterprises of the opening years of the seventeenth century.

The Masters of the Bench lost no time in carrying out Mr. Ashley's wishes. Sir Peter Ball, the Queen's Attorney, and Dr. Littleton,<sup>1</sup> were requested to survey the books which were then catalogued, and have presses made for them in the "lower Parliament chamber." The £300 was paid into the Treasury of the Inn, and the Bench agreed to allow eight per cent. interest per annum. Mr. William Cox, who was an ancient member of the Inn and an executor of the will, was called to the Bar without the usual formalities, "in consideration of this care and fidelity touching these legacies to the House."<sup>2</sup> In 1642 he was definitely appointed to the office of Keeper of the Library, and in 1646 his salary was fixed at £20 per annum. Cox continued to carry out his duties for eleven years, and then was obliged to petition the Benchers "that in regard of his age and weakness of body he might have a fire in the Library and someone to look to sweeping and cleansing thereof."<sup>3</sup> Death seems to have relieved him before the Benchers made

<sup>1</sup> The reference appears to be to the Master of the Temple.

<sup>2</sup> *Ibid.*, p. 919.

<sup>3</sup> *Ibid.*, Vol. III, p. 1054.

any response to his request, but his successors benefited from his petition by receiving an allowance of coal and the assistance of an official to perform the menial duties. Some of the library keepers, however, did not show the same fidelity to their trust as Cox. During the seventeenth century three of them had to be dismissed for neglect of duty, after repeated attempts by the Benchers to induce them to amend their ways.

Unhappily, there is no complete list of the books bequeathed to the Society by Ashley, but about sixty volumes can be identified as his property by the signature on the title page. With one exception, they are all in Latin or some other foreign language and give some idea of the varied nature of his collection. Among them are works on history and geography, theology and philosophy, chemistry and astrology, demonology and witchcraft, thus showing clearly that Ashley's tastes were for the curious and quaint in other tongues rather than the masterpieces in his own language. So far as can be traced, there was no edition of Shakespeare in the library until the nineteenth century. The one book in English with Ashley's signature is Bishop Bilson's "*True difference between Christian subjection and Unchristian rebellion*," written at the desire of Queen Elizabeth against the King of Spain, and used with disastrous effect in later years by the enemies of Charles I.

Around this nucleus has been gathered, by gift and purchase, a fine collection of books. In 1652, Mr. Charles Cox, a Master of the Bench, gave £100 for the purchase of books. He had previously conveyed to the Benchers certain property in the City of London, called Scales' Inn, from which to pay an annual fee of £20 to two Referees. The Treasurer was to appoint two barristers of the Inn "to be Referees, free Mediators and Composers of such differences, suits and demands as shall be voluntarily submitted, and refer'd by any person whatsoever, to their hearing and determination

. . . . . to hear and do their best endeavour to determine all such controversies, suits and demands, as shall be submitted unto them.”<sup>1</sup> They were to be in attendance in the Hall for three hours in the afternoon on two days of the week. In the arrangement may be seen a seventeenth-century prototype of the poor man’s lawyer. On several occasions in the last century, the Referees gave their fees for the purchase of books for the Library.

The Benchers were obliged to decline one handsome offer of eight thousand volumes. John Selden died in 1654 and left his Library to be divided among his executors “or otherwise dispose of them or the choicest of them for some public use than put them to any common sale: it may do well in some convenient library public or of some college in one of the universities.”<sup>2</sup> The books were offered first to the Inner Temple, whose finances did not permit the Benchers to provide suitable accommodation, and probably the same reason led to the decision of the Benchers of the Middle Temple. Finally, they were accepted by Oxford University, of which Selden was the representative during the whole of the long Parliament.

In 1657 the Benchers directed that “a book of parchment leaves shall be provided handsomely bound to register the names and gifts of benefactors.” At the same time they ordered that “all law books which are or shall come forth, shall be bought and placed”<sup>3</sup> in the Library. The accounts show that the Benchers purchased not only law books, but also works of general literature, and as patrons of learning were ready to support the labours of scholars. “Chains for the books in the library” is a constantly recurring item, and the purchase of a foxtail demonstrates that attention was paid to the cleanliness as well as the security of the books.

<sup>1</sup> *Observations on the Constitution, Customs and Usage of the Society of the Middle Temple*. By Wm. Downing. Page 184.

<sup>2</sup> *Calendar of Inner Temple Records*, Vol. II, p. cxix.

<sup>3</sup> *Middle Temple Records*, Vol. III, p. 1110.

Among the benefactions entered in the book of presentations is £50 from Sir William Petyt for the purchase of books. He entered at the Middle Temple, but "migrated" to the Inner Temple, and bequeathed to that Society his collection of MSS. and books acquired as Keeper of the Records in the Tower of London. The addition of this extensive collection to the possessions of the Honourable Society necessitated the appointment of a librarian in 1708.

The Benchers of the Middle Temple have always taken care to possess proper lists of the books. Upon the appointment of a new librarian the library was surveyed by the Treasurer or a committee appointed for the purpose. Book-sellers were commissioned to make a list of the books, which was attached to the bond given as security by the Library keeper. In 1655, £25 was paid to Mr. Moodyman for sorting and cataloguing the books, but no catalogue of that date is now in existence. The first printed catalogue was published in the year 1700, in the treasurership of Sir Bartholomew Shower, who also had the book for presentations rebound, with entries as to the hours of opening. Although for nearly half-a-century the Benchers had been adding all the law books published, the proportion to other classes of literature was not altered perceptibly. Mathematics, geography, history and biography, remain as the principal divisions in the catalogue of 1700, which is arranged according to subjects. The next catalogue was published during the treasurership of Master Worsley in 1734, but had its origin some years before in the work of one Henry Carey, who was clerk in the chapel at Lincoln's Inn. Making an appeal for employment to the Earl of Orford, he wrote in 1717 in a letter, preserved among the MSS. of the Duke of Portland, that he was—

"Keeper of the Library in the Middle Temple, under John Troughton, Esq., where I employed myself in regulating and reducing to decency and order a place which through long neglect was become a perfect chaos of paper, and a wilderness of books, which were mined and misplaced to such a degree that

it was next to an impossibility to find out any particular book without tumbling over the whole. This undertaking cost me about twelve months' hard labour and pains, besides money out of my own pocket to transcribers. However, I went forward with the greatest alacrity because Mr. Ludlow, then Treasurer, encouraged me by repeated promises (which now I may call specious and empty) of reward when completed, as now it is, I having made a new catalogue in five alphabets with columns (all my own invention) of all the tracts contained in the library, which catalogue is one hundred sheets in folio, and the books are now so regularly ranged and the catalogue so plain, easy and exact, that anybody may go directly from it to any required book or pamphlet without any difficulty or hesitation; so that not only the catalogue but even the library itself are evident demonstrations of my labour, and instances of their ingratitude to me who egged me on to this work without rewarding me for it."<sup>1</sup>

In cataloguing the tracts, Carey did a useful piece of work. They constitute an interesting collection now bound in more than one hundred and sixty volumes. Sermons, political pamphlets, especially in relation to the conflict between the King and Parliament, and controversial letters form the greater part of a collection in which there are valuable items such as the description of Virginia, written by William Bullock, in his chamber in the Middle Temple, in 1649. He admitted that he had never been inside the country, but obtained his information from books in six days, which was all the time allowed him by his patrons to write the compilation.

It is difficult to trace the changes in the habitation of the books. At first they were under the Parliament Chamber, then a set of chambers was given up to them, but they were moved on more than one occasion. When Master Worsley wrote his account of the Inn, in 1734, the Library was in No. 2, Garden Court, which stood on part of the site of the present building. The lower part of the building was occupied by the kitchen of the Society. Ireland, in his *History of the Inns of Court*, published in 1800, judged from the "extreme dirtiness" of the books "that they have been little perused in the present era." The impression is confirmed by a note in *The Times* (June 23rd), concerning

<sup>1</sup>  *MSS. of the Duke of Portland*, Vol. V, p. 553.

the removal of the books in 1824 from the "miserable dirty hole in which they have long been concealed," to a new building forming an extension of the Hall. The blank in the book of presentations for nearly a century before the year 1827 would thus seem to have been typical of the condition of the library. Their stay in that portion of the Society's buildings was brief, for in 1858 the foundation of a new library was laid by Sir Fortunatus Dwarris. It was opened by the Prince of Wales, now His Majesty the King, on October 31st, 1861, when he was called to the Bar and Bench of the Inn. Having served the office of Treasurer in 1887, His Majesty is now the senior bencher. His arms emblazon the oriel window at the south end of the library, while those of the benchers at the time of its erection, fill the north window. On the wall hangs a portrait of the founder by Thomas Leigh, painted by order of the Benchers. At the opposite end is a picture of Lord Brougham and M. Berryer, commemorative of the dinner given by the Bar of England to the distinguished French advocate in the Middle Temple Hall on November 8th, 1864. It was the occasion when Lord Chief Justice Cockburn gave the definition of an advocate, which has become a classic. "The arms which he wields are to be the arms of the warrior and not of the assassin," he said. "It is his duty to strive to accomplish the interests of his client *per fas*, but not *per nefas*; it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice."

The erection of a modern building has been followed by the furnishing of the shelves in accordance with the needs of the time. The books upon English, Colonial, American and Foreign law, required for frequent reference, have thrust aside the older volumes of less practical use. But they still

remain as part of the Library, so that it is possible to indulge in a reverie such as Francis Bacon penned, probably in the library of his own Inn of Court, in which he likened libraries to "the shrines where all the relics of the ancient saints, full of true virtue, and that without delusion or imposture, are preserved and reposed."<sup>1</sup> That exquisite charm which fascinates the reader as he forgets himself, his times and customs, by being brought into contact with the minds of past ages, is one which need not be obliterated by the necessity to keep pace with the requirements of the twentieth century. Bacon himself recognised in the same passage the value of new editions, with "more profitable glosses, more diligent annotations and the like." With some confidence, therefore, it may be assumed that the happy association of new and old in the Middle Temple Library would have received the approbation and admiration of the great lawyer and philosopher.

C. E. A. BEDWELL.

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#### IV.—CRIMINAL STATISTICS, 1906.<sup>2</sup>

THE problem of crime presents itself to the moralist and to the political theorist in different ways. The moralist is mainly interested in the personal side of the matter, in the motives which lead the criminal to fall below the standard of conduct expected from the good citizen. The political theorist, on the other hand, is concerned rather with the impersonal fact of the existence of crime. To him crime is essentially a violation of laws laid down by the sovereign power for the maintenance of society. In this connection it is of no importance what views he holds as to

<sup>1</sup> *Of the Advancement of Learning*. The second book.

<sup>2</sup> *Judicial Statistics (England and Wales)*, 1906. Part I.—*Criminal Statistics*. London: Wyman & Sons.

the principles on which the sovereign power should make laws: he may be a rabid Individualist, deprecating legislation, and amused with the notion that men can be made moral by Act of Parliament, or he may be a wild Socialist, indignant that others do not agree with him in thinking that social progress may be hastened by increased activity on the part of Government. Whatever the colour of his creed, he knows that there are, and must be, laws by which certain acts and certain abstentions are required of the citizen under pain of punishment. And further, he knows that the object of these laws is to maintain a condition of social life in which the individual shall be able to develop himself to the utmost of his power, provided that he does not thereby curtail the opportunities of others to do the same. For all schools of political theory agree that the self-development (or happiness) of the individual citizen is the end the State has in view, and probably all agree that some measure of self-sacrifice is required of every member of an organized society, unless, indeed, they resort to the desperate device of asserting that, after all, self-sacrifice is self-development. Now, if a general obedience to law is required in order to secure the end of the State, it is clear that crime—or disobedience to law—is a serious problem to the political theorist. Thus he holds that only by living in an organised society can the individual secure his happiness or self-development, and he further holds that the laws of that society prohibit only such actions as are incompatible with the character of the good citizen. Clearly, therefore, the existence of a law-breaking class implies one of two things: either the lawbreakers deliberately reject the ideal of conduct accepted by their fellows, and ride rough-shod over the laws by obedience to which that ideal is realised, or the pressure of circumstances may be so severe as to compel persons who accept the ideal, on occasion to be false to their better selves. In other words, the existence of crime means



the existence either of persons habitually<sup>1</sup> criminal, or of persons who from time to time lapse into crime. Social progress involves the disappearance of both these classes, and the importance of criminal statistics to the political theorist is, that they afford some means of judging whether there has been such progress or not. We take this to be their permanent significance, but lack of space will prevent us in the following pages from calling more than incidental attention thereto.

The volume of criminal statistics for 1906 possesses a double interest. The Introduction, prepared by Mr. Farrant and revised by Mr. Eagleston of the Home Office, contains not only an analysis of the figures for 1906, but also a short sketch of the course of crime since 1857. In 1857 the annual returns of trials at Assizes and Quarter Sessions were for the first time included in a comprehensive statement of criminal proceedings, and it is now possible to survey the results of half-a-century. It will be as well, however, to repeat the warning contained in the Introduction, that no exact comparison of the figures for 1906 with those for 1857 is possible, owing to the extensive changes in Criminal law due to the Consolidation Acts of 1861. And while we are on the subject of warnings, we may as well here call attention once again to the perils of inferences from figures—the most abstract of all categories—in relation to crime, a subject-matter as “concrete” as anyone could desire.

The statistics as usual divide offences into three classes,<sup>2</sup> indictable offences, *criminal* non-indictable offences, other

<sup>1</sup> It is interesting to note that the police estimate that on the first Tuesday in April, 1906, there were 4,126 habitual criminals at large in England and Wales, out of a population of some 34½ millions. Of this number 3,539 were thieves, and 383 receivers of stolen property—clear enough proof that systematic dishonesty constitutes the bulk of “professional” crime.

<sup>2</sup> The number of persons in 1906 for trial or tried for (a) indictable offences was 59,079; (b) *criminal* non-indictable offences, 82,264; and (c) other non-indictable offences, 618,714; total of the three classes, 760,057.

non-indictable offences. The first class includes practically all offences which vaguely occur to the mind when one speaks of "crimes." The second comprises offences of a less serious nature, but none the less involving violence, or cruelty, or dishonesty, such as common assaults, or cruelty to children, or frequenting. The third and by far the largest class contains the host of offences which, by comparison with the foregoing classes, might almost be described as offences against the etiquette of society, such as breaches of bye-laws, not in general involving violence, or cruelty, or dishonesty. It is generally agreed that the statistics of persons tried for indictable offences afford the best means of judging of the prevalence of crime at any given time, and we propose first to compare the figures for the year 1906 with the average figures for the years 1857-61.

The result of this comparison is very striking. In 1906, 59,079 persons were tried for indictable offences: the corresponding average number for 1857-61 is 52,346. This gives an increase of 12 or 13 per cent. But whereas the population in 1857 was roughly 19½ millions, it is now 34½ millions, roughly an increase of 80 per cent. While population, therefore, has increased by 80 per cent., crime (as measured by the number of persons tried for indictable offences) has increased only by 12 per cent. We may show this result in other ways. Thus, the proportion of persons tried for indictable offences to every 100,000 of the population for 1857-61 was 265·89; in 1906 it was 171·01. Or, again, had this proportion for 1906 been also the proportion for 1857, the number of persons tried for indictable offences in 1857 would have been 32,999: it was in fact 54,667. The result is, therefore, that there has been a remarkable decrease in the amount of serious crime during the last 50 years. The decrease is the more remarkable if we bear in mind the following considerations. First, it is now possible

to prosecute with much less inconvenience than in 1857, owing to the extension of summary jurisdiction. Aggrieved persons who would be unwilling to undergo the trouble of prosecuting, if this involved the necessity of appearing at Quarter Sessions or Assizes, are far less unwilling to prosecute when they know that the case can be dealt with summarily and speedily by the justices. And it is quite clear that the extension of summary jurisdiction has had the effect of increasing prosecutions. To take only one instance, the Summary Jurisdiction Act of 1899 enabled justices to deal summarily with the offence of obtaining by false pretences: the result was a steady increase during the next five years in the number of prosecutions for this offence. During the last 50 years the activity of Courts of Summary Jurisdiction has greatly increased, while Courts of Assize and Quarter Sessions have had less work to do. The number of trials for indictable offences was roughly the same in 1857 and 1906; but, while in 1857 Courts of Assize and Quarter Sessions dealt with 20,269 cases, in 1906 they dealt only with 12,757. Now since facilities for prosecution undoubtedly reduce the reluctance to prosecute, and since these facilities are greater now than they were half-a-century ago, it is reasonable to infer that at the present day fewer crimes go unprosecuted than in 1857. And, therefore, the decrease in the amount of crime in 1906, when compared with the amount in 1857, must be greater than appeared from the comparative figures given above. And secondly, we have also to consider the fact that sentences are much less severe now than in the old days. The criminal who would have got 7 years' or 10 years' penal servitude now gets off with 3 years or 5 years. This means that he is the sooner able to recommence his predations on society. Almost certainly the habitual criminal of to-day commits many more offences than he would have had the chance of committing 50 years ago.

If sentences now were as severe as in former times, the "old hand" would be longer under lock and key, and the total number of offences would decrease. We must, therefore, make due allowance for the fact that the regular criminal has now much more scope for his activities than before, and this once again leads us to conclude that the decrease in crime is greater than is at first sight apparent. The fact that there is a decrease in crime generally, despite the fact that the "professionals" have more opportunities for following their dishonest trade, must mean that there is a considerable diminution in crime among the rest of the community.

It is interesting to observe that in 1906, roughly, eleven-twelfths of the crimes (restricting "crimes" to indictable offences) committed were crimes of dishonesty. There were 3,398 cases of burglary, housebreaking, robbery and extortion: and 51,338 cases of larceny, receiving and fraud. The total of these offences is roughly 54,500: and the total number of indictable offences for the year is roughly 59,000. In 1857-61, the average numbers were, for burglary, housebreaking, robbery and extortion, 1,811: for larceny, receiving and fraud, 46,892: and the average total number of indictable offences 52,346. It is generally recognised that burglary and housebreaking are the special crimes affected by the professional criminal. The number of these offences has about doubled during the last half-century, and has roughly kept pace with the increase in population. We need not, however, infer from this that the number of professional criminals has doubled. Considerable allowance must be made for the fact previously mentioned, that sentences are much more lenient: the modern burglar at the end of his career can reflect with pride that he has a good many more "hauls" to his credit than his forefathers in the profession, and we may therefore conclude that the percentage of habitual criminals to the total population is decreasing.

The figures for thefts show that there has been a substantial diminution of this sort of offence, proportionately to the population, during the last fifty years. The decrease is roughly one of 40 per cent. Speaking generally, the professional criminal does not contribute very largely to the number of thefts: they are in the main committed by persons who commit crime more or less spasmodically. As thefts constitute, roughly, five-sixths of the sum total of indictable offences, it is interesting to speculate on the causes of the diminution which has taken place. Practically, we may say that if we find these causes, we have found the causes to which the general diminution of crime during the last fifty years may be ascribed.

It seems to us that these causes are in the main economic. Crimes of dishonesty are not in general crimes of "passion." They are not the outcome of a momentary loss of self-control, but are due to a more or less settled discontent. Now the average man, who has all the necessities of life, and more or less of its luxuries, does not steal. He can claim no special merit for being honest; he simply has no reason to steal. But take that man and put him in circumstances in which hunger and destitution are unpleasantly near, and he will then realise that honesty is no longer a virtue of which he can be complacently proud, but a really difficult business. He will find that the distinction between *meum* and *tuum*, which he once thought so clear, begins to get blurred. That is to say, he will appreciate for the first time the conditions under which no inconsiderable number of the inhabitants of this country live. If we further suppose this man to be stripped of the advantages which a decent up-bringing have secured for him, his education and habits, his health, his friends, we have no merely fanciful picture of the type of man produced by conditions now existing in the lower grades of society. And if we go one step further, and suppose him to be

infected with the habits and ideas which are the natural outcome of surroundings of vice and poverty, we have some idea of the sort of creature likely to emerge from the lowest depths. It seems to us that there is some advantage in presenting the matter from the top side, so to speak—it enables the average man, who thinks hazily about crime as the result of unprincipled wickedness, to realise how many props to his moral life would collapse if he were to sink lower down in the scale of society. It is, of course, open to the moralist to object that any such view as this robs men of their personal responsibility and palliates crime. We have no wish to quarrel with the moralist: the question “How to be honest, though destitute and uneducated, and unhealthy in mind and body?” is a legitimate subject for his inquiry. And, of course, it would be absurd to think that every destitute person is dishonest. But it seems to us a merely perverse ignoring of plain facts if the moralist refuses to admit that economic conditions play a very large part in determining the amount of crime. A Lord Chief Justice of the country once hazarded the opinion, in delivering judgment, that “things are what they are”: and sheltering ourselves behind this authority, we venture to think that mere good advice is not likely in the average case to reclaim a thief from his evil ways.

It is conceded on all hands that the last half-century has witnessed a great improvement in the conditions of life of the poorer classes; and we can hardly avoid connecting the general rise in the standard of life—not only of the material side, but also the educational side—with the decrease in dishonesty. It is unnecessary to labour the point. It will suffice merely to point to the different policy with which the question of youthful crime is now treated. The Borstal system is intended for the reclamation of the young “hooligan” offender. Its essence is that the youth who is on the way to becoming an habitual criminal shall be for

some considerable time subjected to a strict discipline; with plenty of hard work, decent food, and opportunities of learning a trade. That is to say, it proposes to supply some of those conditions of life which the average citizen enjoyed in his youth, and which are still out of the reach of many of the poorer classes. The principle of reclamation is also the principle of the Probation of Offenders Act of 1906; and it is embodied in many of the provisions of the Children's Bill now before Parliament. One might almost say that this Bill definitely abandons the idea of "punishing" children.

It is interesting to note, in connection with this matter of youthful crime, that during the last few years there has been a very great decrease in the number of children sent to prison, and that the Borstal system has been the cause of the passing of long sentences (of 12 months' imprisonment and upwards) on offenders suited for treatment under that system. This is as much as to say that the futility of short sentences for youthful offenders is more and more widely recognised.

It would be idle to deny that there is no inconsiderable amount of crime committed by persons who have had the benefits of a good up-bringing. But it cannot be denied that the great bulk of serious and significant crime is committed by persons whose circumstances—of up-bringing, education, and health—cannot by any stretch of imagination be called satisfactory. We may remind the moralist of Aristotle's remark, that the good life is impossible without a sufficient economic basis, and we may reasonably conclude that the remarkable decrease of serious crime during the last 50 years is to be ascribed to economic improvement. It is only to be expected that this economic improvement should have its first effect in diminishing the number of crimes committed by persons who are not habitually criminal. For the habitual criminal generally comes from those

strata of society which are the last to be affected by improved conditions. And we do in fact find that the special crimes of the habitual criminal are those in which there has been the smallest decrease.

The next point to consider is the number of *criminal non-indictable* offences for the years 1857 and 1906. The reader will recollect that under this category are included offences of a less serious type than those we have just considered, but still definitely "criminal." There were 113,330 such offences in 1857, and only 82,264 in 1906. There is thus a considerable decrease of numbers, even without taking into account the increase of population. The number of assaults has decreased by some 28,000; it stood at some 79,000 in 1857, and at 51,206 in 1906. There is also a marked decrease in those lesser offences involving dishonesty which are grouped in this class, such as unlawful possession. The average figures for 1857—1861 were 12,298, and the figures for 1906 are 6,357, showing a decrease almost of one-half. This agrees with the results of the figures for the first class of crime we considered—that offences of dishonesty are generally on the decline.

Lastly, we must refer to the figures for the non-criminal non-indictable offences. Here, as we would expect, there is a considerable increase in the numbers. The number for 1906 was 618,714, and for 1857, roughly 230,000. This increase is more rapid than the increase in the population. But it must be remembered that very many minor offences have been created by statute during the last half-century: and offences of the present day were no offences at all in 1857. Thus, in 1906, there were 53,399 offences against the Education Acts; in 1857 there were none. Again, there were no motor cars or bicycles in 1857, and, in consequence, no convictions of driving at excessive speed or of riding without a light. It is interesting to observe that the average number of persons tried for drunkenness in 1857—1861 was



84,358, and that the number of persons so tried in 1906 was 211,493. There is just now much talk of temperance and legislation, and it might arouse political passions if we were to venture on any inferences from these figures; let the reader infer as he will. We will be content to observe that ideas have probably changed since the days when it was possible to write:—

“ Not drunk is he who from the floor  
Has power to rise and still drink more ;  
But drunk is he who prostrate lies,  
And has no power to drink or rise.”

Finally, we may note that the miscellaneous offences included in this class under the heading of Breaches of Police Bye-laws and Regulations, have increased from 38,633 in 1857 to 132,504 in 1906. The increases in the figures under this head and for drunkenness, combined with the offences against the Education Acts, account for the increase—at first startling—in the total figures for this group of offences.

We may next say a word as to the changes in procedure. We have already pointed out that the number of criminal cases tried at Assizes and Quarter Sessions has decreased in round numbers from 20,000 in 1857 to 12,500 in 1906. This means that there has been a vast increase in the work done by Courts of Summary Jurisdiction. In 1857, 34,521 cases of indictable offences were dealt with by justices: by 1906 the number had risen to 46,322. When we also remember that the number of non-indictable cases heard by justices in 1857 was roughly some 340,000, and in 1906 was 700,978, and when we further think of the increase in the civil matters with which they now deal, it is not too much to say that the development of the business of Courts of Summary Jurisdiction is one of the most striking features of the legal history of the last half-century. The procedure is speedy and inexpensive, both desirable attributes to those familiar with “the law’s delays”—and costs. Everyone of course is

aware of the suspicion of contempt with which it is usual to speak of "Justices' justice." It is a singular fact that in 1906 there were only 131 appeals against convictions by Courts of Summary Jurisdiction. Even when we allow for the fact that appeals are comparatively costly, the smallness of the number is a striking testimony to the way in which the justices discharge their duties. It would of course be mere folly to assert that every justice is a Solon in miniature, and no doubt the increased publicity of police court proceedings, and the rise of the large body of clerks to justices (not to speak of the vigilance of the Press), has something to do with the increasing confidence in justices which Parliament shows. Moreover, recent legislation has widened the field from which justices are now selected, and though from time to time there is agitation for an increase in the numbers of stipendiary magistrates, we do not think that we shall meet with very serious contradiction if we say that in general there is entire satisfaction with the present system by which gentlemen, as a rule possessed of no special legal qualification, administer without fee or reward the varied business of our Courts of Summary Jurisdiction. The immortal Mr. Nupkins—who believed that "duelling is one of His Majesty's most undoubted prerogatives," and who was not quite sure whether he had not power to "commit" anyone at sight—may have been a caricature of the justice of his time, but he is a wild burlesque of the typical modern justice: precisely as his satellites, Grummer and Jinks, are almost unrecognisable parodies of the modern police constable or clerk to justices.

The last point which we shall notice, for the purpose of comparing figures for 1857 and 1906, is in connection with the statistics of crimes (*i.e.*, indictable offences) known to the police. The average annual number of crimes known to the police in 1857-61 was 88,196: the number in 1906 was 91,665. These numbers are curiously alike, and the proportion of

persons tried to the offences reported also remains about the same. We might have expected the figures to show that fifty years ago the proportion of persons tried to the offences known was less than at the present day. For there cannot be room for doubt that the general efficiency of the police has increased during the last half-century. Improved methods of communication, increased facilities for travelling, and latterly an improved system of identification, should lead to the more certain detection of crime. Of course modern criminals are not slow to avail themselves of modern improvements, and perhaps the game is played more skilfully on each side. It may perhaps be surmised—though it is only a surmise—that people were not so ready to report offences to the police fifty years ago. They may have been unwilling to run the risk of being saddled with the bother of prosecuting when prosecution was not so simple an affair as it is now. This cannot, however, at all sufficiently account for the curious similarity of the results for 1857-61 and 1906. Possibly the increased efficiency of the police now-a-days may inspire a more lively fear of detection if a crime is committed, and this fear of detection may serve to prevent the commission of those offences which would be easily brought home to the offender. And, again, we must remember the increased opportunities for committing crime which the habitual criminal now enjoys.

We now turn to the figures for the year 1906, with the object of comparing them with the figures for the years immediately preceding. Necessarily, results cannot be shown on so large a scale as when we are dealing with a period of fifty years. In our view, the amount of crime depends mainly on economic conditions, and radical changes of the social structure do not happen in a year or two. Inferences, therefore, from the figures of 1906, when compared, say, with the figures for 1904 or 1905, cannot be so

safe or instructive as when the inferences are drawn from a long period, during which chance variations cancel one another. Thus one year may be a year in which employment is good, and as a result, crimes of dishonesty will be less than in the next year when 'trade is bad. Or one summer may be fine and lead to an increase in vagrancy and in the offences which the vagrant commits: the next summer may be wet and the result will appear in a reduction of the number of offences which flourished in the preceding summer. Such results as these, though not uninteresting, do not possess the same interest as the results which we have attempted to draw in the foregoing pages.

Taking first the figures for the usual three classes of offences, we find that 59,079 persons were tried for indictable offences, 82,264 for *criminal* non-indictable offences, and 618,714 for other non-indictable offences. The corresponding figures for 1905 were, 61,463, 85,139, and 644,588. There is thus a considerable decrease in each class—roughly 2,500 in the first class, 3,000 in the second class, and 26,000 in the third class. And, therefore, the general conclusion is that 1906 was a year of decreasing criminality. Doubtless the decrease was very largely due to the fact that during that year employment was plentiful: the per-centage of unemployed among members of trade unions was less than at any time since 1901, and as a result there was a decline in the number of offences against property.

Hitherto we have not analysed the separate kinds of offences which are grouped together in each of the three main classes. It will be worth while, in the closer examination of the statistics for 1906, to refer to the figures for particular offences.

The principal crimes included in the class of indictable offences are offences against the person, offences of violence against property, offences against property, malicious injury to property, and offences of forgery and coining.

Offences against the person have increased roughly by 210. The figures for 1905 were 2,503; for 1906 they are 2,704, an increase of about 8 per cent. This increase consists of 122 crimes against the person and 79 sexual offences. It is generally agreed that times of increased prosperity show an increase of offences against the person, and a decrease of offences against property. This increase is therefore not surprising. With regard to the increase by 122 of crimes against the person, we may note that the increase of the offences involving actual physical violence against the person, *i. e.*, felonious or malicious wounding, is not more than 39. There were 42 cases of intimidation, as against none in 1905—a result due to strikes which occurred in 1906. The other offences which are classed as “offences against the person” do not involve direct personal violence. With regard to the increase by 39 of offences of actual violence, it should be remembered that for some time before 1906 assaults on the police had been growing in frequency, and in 1906 it happened that when the assault was peculiarly bad, the offender was sometimes committed for trial on the more serious charge of wounding, instead of being summarily punished for assault. This fact may account in some degree for the increase with which we are dealing.

In the Introduction to the statistics attention is called to the fact that the number of assaults tried summarily, and of convictions for drunkenness, generally varies directly with the number of offences against the person: and it is noted that in 1906, despite this general rule, indictable offences against the person increased, while assaults and cases of drunkenness diminished, the former from 52,811 to 51,206, the latter from 219,276 to 211,493. We suggest that the contradiction in 1906 of the general rule is not so great as appears at first sight. In the first place, the increase of offences of direct violence against the person is only 39, and

even with this number we have to make allowance for the fact that a number of persons who in other years would have been tried summarily, were tried on indictment for injuring police constables. And, in the second place, it will be remembered that in 1906 the Royal Commission on the Metropolitan Police was appointed. It is not unreasonable to suggest that the frequent attacks about that time in the less responsible newspapers, on the veracity of the police, led to a reduction in the number of police prosecutions for those offences in which it was easy for the defence to accuse the police of perjury. A policeman after all is human, and no more likes to be called a liar than any of the rest of us, and it is a matter of common knowledge that police charges during 1906 and 1907 were frequently met with counter-charges of perjury and malpractice. Had Mr. Weller been alive, he might perhaps have modified his general theory that an alibi is the safest line of defence. When we observe, therefore, that the number of Police Court cases decreased generally in 1906, we do well to bear in mind the likelihood that this decrease is partly due to an increased reluctance to prosecute on the part of the police. And we may reasonably doubt whether the figures for 1906 show any real exception to the rule, that crimes of violence against the person vary directly with assaults and offences of drunkenness.

Returning to the figures for indictable offences, we note that the second group of these offences—of violence against property, such as burglary and housebreaking—has fallen from 3,460 in 1905 to 3,398 in 1906. We have observed before that these offences are the peculiar province of the professional criminal, and it is satisfactory to note a decrease. We have also observed that the more lenient sentences of the present day enable the "old hand" to commit more crimes than in former days, and that there is reason to think that the proportion of habitual criminals to the total population is decreasing.

The third group consists of offences against property without violence. The total number is 51,338, a decrease of 2,506 from the total for 1905. Of this total, 1,990 are cases of larceny from the person. This form of crime is generally the work of a more or less "regular" criminal, and it is satisfactory to note that here, too, there has been a decrease of numbers since 1905, when 2,171 such offences were committed. Simple larcenies have fallen from 47,984 in 1905 to 45,596—a decrease of 2,388. Under this head come all the spasmodic offences committed by persons who succumb to temptation through poverty or lack of work, and who cannot fairly be classed among the definitely "criminal classes." The decrease may, no doubt, be ascribed to the improved state of employment. The fourth group—of malicious injuries to property—is only small: the figures have increased from 395 in 1905 to 418 in 1906. Of these 184 were cases of arson, a decrease by 10 of the number in 1905. This is probably a "chance" variation, though the Introduction points out that offences of begging and sleeping out also diminished in 1906. Perhaps, therefore, the decrease in vagrancy may account for the decrease of arson.

In the fifth group—coining and forgery—the chief point of interest is the increase of coining. There were 47 cases in 1906 as against 35 in 1905. The suggestion is made in the Introduction, that descriptions of the process of coining which appeared in a monthly magazine in 1902, and in a newspaper in 1904, may have had something to do with the increase of this offence during the last four or five years. The suggestion is based on the fact that during the last five years, 4 cases have come before the Home Secretary in which there was reason to think that the prisoners had been led to commit the crime of coining owing to the information supplied in these descriptions.

With regard to the remaining two main classes—*criminal*

non-indictable offences and other non-indictable offences—we have no space for more than to call attention to the general decrease which marked 1906. The former class fell from 85,136 in 1905 to 82,264 in 1906; the latter from 644,588 in 1905 to 618,714 in 1906.\* But we may, perhaps, just say a word as to offences against the Motor-Car Acts, which are included in the latter group. In 1904 there were 3,879 prosecutions for these offences, in 1905, 6,777, and in 1906, 6,777, exactly the same number. It is, perhaps, somewhat optimistic to suggest, as is done in the Introduction, that offences of this sort have reached a normal level; and it is worth while to point out that the Royal Commission on Motor Cars reported during 1906. Among other things, the Commission suggested that speed should not be punished simply because it was speed, but only when it was dangerous speed. This suggestion may not improbably have influenced police authorities in dealing with motor traffic, and have led to a diminution in the prosecutions for driving at excessive speed, when no danger to the public was involved.

We may next note the statistics with regard to the exercise of the prerogative of mercy. Excluding the cases—115 in number—in which convicts on licence were excused from the necessity of reporting themselves from time to time to the police, we find that the prerogative was exercised in 362 cases. In 114 of these, remission of sentence was granted on medical grounds: in 191 cases, it was granted as an act of grace, on account of mitigating circumstances. Only 22 persons were released on grounds affecting the original conviction. It will be interesting in future years to note the effects of the Criminal Appeal Act which comes into force this year, and to observe whether there is any material difference in the number of cases in which the original conviction is held to be bad.

There is one point in the Criminal Statistics to which attention may be drawn. The Prison Act 1898 enabled Courts,



in passing sentence of imprisonment without hard labour, to direct that the prisoner should be placed in the first division of offenders, or in the second division; if no such division is given, the sentence is served in the third or ordinary division. The object of this provision was to make it possible that prisoners of generally good character should be kept apart from those of bad antecedents. But the Courts show little inclination to make use of their powers under this Act. Thus, in 1906, out of 61,157 persons sentenced to imprisonment without hard labour, only 60 were placed in the first division, and only 2,352 in the second division. It is perhaps not so surprising that only 60 were placed in the first division; for imprisonment in this division involves little more than mere detention. But the number of persons actually placed in the second division, compared with the number who might properly be so placed, is small, and it is a matter of regret that the Courts neglect their power in this respect.

We may conclude by referring to the interesting statistics of the first year's working of the Aliens Act 1905, in regard to expulsion orders made against alien criminals by the Home Secretary, which show that 435 recommendations for expulsion were made by Courts in England and Wales. In 139 cases the alien had not completed, on December 31st, 1906, the term of imprisonment or penal servitude which the Court imposed on him, in addition to recommending his expulsion. The remaining 296 cases became ripe for decision during 1906, and in 275 cases expulsion orders were made. As for the 21 cases in which no order was made, it appears from the Statement appended to the Report of H. M. Inspector under the Act, that in three cases the recommendation was made by Courts having no jurisdiction to recommend; in three further cases no order was necessary, as the aliens were removed by their own consul; and in one case the alien absconded, having been released on bail pending

an appeal against the conviction. In the remaining 14 cases there were special circumstances, such as length of residence in this country, or the dependence on the alien of a family mostly British-born. Of the 275 cases in which an order was made, 202 belonged to the Metropolis. The crimes which led to these expulsions were, to a very large extent, "professional" crimes against property and offences against morality. Thus in 186 cases the offence was one of larceny, fraud, burglary, housebreaking or receiving. The results, therefore—so far as crime in this country is concerned—are satisfactory. They mean the removal of a number of persons who by practice and example are a source of mischief to the community.

#### V.—SALVAGE AWARDS.

IN no sphere of the law has the Court a wider discretion than it has in the assessment of salvage awards. The absence of any fixed standard of remuneration for salvage makes the amount of the salvor's reward entirely dependent upon the exercise of judicial discretion. "There is no jurisdiction known," said Lord Esher, in *The City of Chester*,<sup>1</sup> "which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered as for the purpose of deciding the amount of salvage reward." And the Merchant Shipping Act 1894 imposes no conditions on the exercise of this discretion: "it merely provides that a "reasonable amount of salvage" shall be paid to salvors (sect. 544). Under these circumstances it is extremely difficult for interested parties, even in a case where the fact and nature of the salvage service are admitted, to form any

<sup>1</sup> L. R. [1884], 9 P. D. 182, at p. 187.

estimate of the amount which the Admiralty Court will award as remuneration for the salvage service, and so to arrive at a settlement of the claim.

There is only one general rule to guide the parties, which is that where the owner of the salvaged property appears in the salvage action, the award will not exceed half the value of the salvaged property. But even to that rule there have been exceptions. Thus in *The Erato*,<sup>1</sup> where the value of the salvaged property was £3,700, an award of £2,000 was decreed. That decision may, however, be explained by the peculiar facts of the case: there were several sets of salvors, the services were of a particularly meritorious character, and the performance of the services involved one set of salvors in a loss which considerably exceeded the whole value of the salvaged property. In an unreported case in 1899, *The Hulda*, salvors of a vessel which had been abandoned by all her crew except the master and a seaman, were awarded £370 on a value of £674. Another instance is to be found in the case of *The G. N. Wilkinson* (1905), which is also unreported, where salvors of a derelict steamer valued at £2,870 were awarded £1,450. In each of those actions the owners of the salvaged property were represented.

Where, however, the owners of the salvaged property do not appear, the award is only limited by the value of the salvaged property. Thus salvors of a derelict marine boiler of the value of £58 have been awarded £50 (*Boiler ex Elephant*<sup>2</sup>). In an unreported case, *The Arthur*, where a derelict schooner with a cargo of timber had been towed into port by two trawlers, and in the salvage action which followed only the cargo-owners appeared, the Court awarded the salvors £600 out of £946, the proceeds of sale of the ship and cargo. Lastly, in the recent case of *The Louisa*<sup>3</sup>

<sup>1</sup> L. R. [1888], 13 P. D. 163.

<sup>2</sup> 64 L. T., N. S., 543.

<sup>3</sup> L. R. [1906], P. 145.

the whole of the net proceeds of sale of the ship and cargo were awarded to the salvors.

In the case of derelict it was formerly the practice of the Admiralty Court to award the salvors half of the salvaged property. Thus Dr. Lushington, in *The Watt*,<sup>1</sup> said: "The case, therefore, being, strictly speaking, a case of derelict, the Court is, I think, bound to give the salvors a moiety of the property subject to deductions." It is difficult to understand why that standard of remuneration came to be adopted. The fact of a vessel being derelict generally, no doubt, imports a high degree of danger to the vessel and her cargo, and it may also render the performance of salvage service laborious as well as dangerous. But the risk to salvors may be greater in a case of non-derelict, and property may be in infinite danger though it is not derelict. However that may be, it is now clearly recognised that there is no such rule, and the fact of a vessel being derelict is only considered by the Court as an ingredient in the degree of danger attaching to the salvaged property and to the performance of the salvage service.

In addition to the rule already mentioned, that in a case where the owner of salvaged property appears not more than half the value of the salvaged property will be awarded, the Court has one important principle to guide it in the assessment of an award. The Court looks "not merely to the exact *quantum* of service performed in the service itself, but to the general interests of the navigation and commerce of the country which are greatly protected by operations of this nature" (per Lord Stowell). Accordingly, the Court always rewards liberally services rendered by steamers, which by reason of their speed and power are specially fitted to perform salvage services with promptitude and efficiency. So, also, the Court looks with favour upon services rendered by salvage steamers established and maintained for the

<sup>1</sup> 2 W. Rob. 70, at p. 71.

purpose of rendering salvage services. An instance of the liberal treatment of claims for services rendered by the latter class of vessel is to be found in the case of *The Glengyle*.<sup>1</sup> There two salvage steamers rendered very valuable services in salving a steamer which was in great danger of sinking. The Court made an award of £19,000 on a value of £76,596, which was upheld in the Court of Appeal and in the House of Lords. Sir Gorell Barnes, in making the award, acted upon the principle stated by Sir Charles Butt in an earlier case, where he said: "To my mind, one of the most important functions of this Court is to encourage the maintenance of powerful and efficient steam-tugs around our coasts, to be in constant readiness to assist vessels in distress. Not only in the course of the year is a large amount of property saved by these means, but a considerable sacrifice of life is prevented. Therefore the principle we go upon is not that of a *quantum meruit*, but of giving such an award as will encourage people to keep vessels of adequate size and dimensions ready to go out."

The same consideration ought also, it is submitted, to lead the Court to discourage life-boats from rendering salvage services to property in competition with other salvors ready and able to perform the same services. Life-boats are maintained primarily for saving life. Their use for the salvage of property is a departure from the objects of the Life-boat Institution, and it ought to be permitted only where the services of a life-boat offer the sole or most efficient means of effecting a salvage of property. Otherwise, not only is there a risk that the life-boat may be so injured in the performance of property salvage services as to be unavailable when needed for the saving of life, but owners of steam-tugs and salvage steamers will not be encouraged to maintain their vessels in constant readiness to assist vessels in distress, if the competition of life-boats, which will grow more serious with the

<sup>1</sup> L. R. [1898], P. 97.

increase in the number of steam life-boats, is allowed to continue unrestricted.

But to return to the considerations which affect the assessment of an award, besides the policy of liberally rewarding prompt and effective services, there are certain well-ascertained circumstances which the Court always regards of primary importance in assisting it to come to a conclusion. These circumstances may be summarised as follows: the degree of danger from which life and property have been saved, the value of the salvaged property, the degree of danger to life and property incurred by reason of the salvage service, the value of the salvaging property, the skill, labour, and loss of time of the salvors, and the risks, loss, and expense of the owners of the salvaging vessel. Upon the number of these elements and the degree in which they are present depends to a large extent the size of the award. But when that has been said all certainty ends. It is impossible to deduce any satisfactory conclusion from the decided cases as to the comparative importance of the various ingredients of a salvage service. Thus, considerable difference of opinion has been proved to exist as to whether the risk to salvors or the value of the salvage service should be the first consideration. In *The Janet Court*,<sup>1</sup> Sir Francis Jeune said, that "the first and perhaps the main element in an award of salvage is the risk to which a salvaged ship and her cargo are exposed." And the judgment of the Privy Council in the well-known case of *The Fusilier*<sup>2</sup> is in accord with that view. "It was not quite correctly said in the argument at the Bar that what is risked is the first thing to be regarded, and the next, the services which are rendered. It would have been more accurate to have reversed the order of these considerations, and to have said that the first thing to be regarded is the value of the services with reference to the amount of property rescued from peril, and

<sup>1</sup> L. R. [1897], P. 59, at p. 62.

<sup>2</sup> Br. & L. 341.

the next, how far the merit of those services is enhanced by the risk to life or property which has been involved in them." On the other hand, Lord Esher, M.R., in *The Lindfield*,<sup>1</sup> preferred to follow the view expressed by Lord Stowell in *The William Beckford*,<sup>2</sup> where he says: "What enhances the pretensions of salvors most is the actual danger which they have incurred; the value of human life is that which is and ought to be principally considered in the preservation of other men's property; and if this is shown to have been hazarded it is most highly estimated."

The same uncertainty prevails with regard to the relative importance of other of the ingredients of a salvage service. Of the value of the saved property, Sir John Nicholl has said that it is "certainly not an immaterial circumstance," while Lord Esher, in *The Lindfield* (*supra*), described it as a "most material and important consideration." Nor can much assistance be derived from the judgment of the Privy Council in *The Amérique*,<sup>3</sup> where the rule is laid down that "though the value of the property saved is to be considered in the estimate of the remuneration, it must not be allowed to raise the *quantum* to an amount altogether out of proportion to the services actually rendered." The fact is that the degree in which any of the circumstances already enumerated affect the award, depends, if one may adapt Selden's well-known saying, upon the measure of the judge's foot. The judicial discretion is exercised variously, and a perusal of the cases shows the impracticability of endeavouring to classify the ingredients of a salvage service according to their importance.

There is, however, one element in an award which it is desirable to discuss here, by reason of special consequences which sometimes follow from the Court's treatment of it.

<sup>1</sup> 10 Times L. R. 605.

<sup>2</sup> 3 C. Rob. 355, at p. 356.

<sup>3</sup> L. R. [1874], 6 P. C. 468.

This is salvors' loss and expense. In many cases, the loss and expense entailed upon the owner of the salving vessel amounts to a considerable sum, and in comparatively few cases are salvage services of any importance performed without some loss or expense being incurred by the owner. The principal items of such loss and expense are the cost of extra wages, coal and provisions, extra premiums payable to insurers of ship and cargo, loss of charter-parties, liabilities to owners of cargo arising from delay or damage, the cost of repairing damage to the ship, and loss of employment of the ship. Where any of these items are present in a high degree the shipowner may be involved in a heavy loss. Thus, in *The Erato*,<sup>1</sup> the repairs of the damage incurred in the salvage service by one alone out of several salvors cost £4,700. In *The Jupiter*, an unreported case in 1901, the loss and expense of the owners of the salving vessel amounted to £2,157. And many similar instances could be given. Now the old practice of the Admiralty Court was to assess the loss and expense separately, and to make an allowance in respect of it under a separate head of the award. For some reason, perhaps because of the increasing difficulty of assessing the loss and expense, owing to the great size of modern vessels, and to the uncertainty which still prevails as to the extent to which such losses ought to be taken into consideration by the Court, the practice has been changed. The practice now is for the Court to make an award in the form of a gross sum, covering both salvage reward proper and any allowance which it chooses to make in respect of loss or expense; and for the purpose of estimating the allowance the Court is content to obtain a general idea of the alleged loss or expense without entering into a detailed examination of it. The extent of the allowance will depend upon the value of the salvaged property and the character of the salvage service. Where the value of the

<sup>1</sup> L. R. [1888], 13 P. D. 163.



salved property is large, and the services were important, the allowance may be considerable, though even in such a case it may fall far short of an indemnity to the owner of the salving vessel. If, however, the services were trivial, or the value of the salved property is inconsiderable, only a small, or perhaps no, allowance will be given. In any case the difficulty of anticipating what allowance will be made has been very greatly increased by the change of practice, because no sum being mentioned by the Court as the amount allowed, there are no precedents from which interested parties can obtain guidance.

That is not, however, the only disadvantage of the present practice. There are not a few cases in which it actually causes serious injustice to shipowners or to underwriters. The injustice may arise in one of several ways. When a gross sum is awarded, which includes an allowance for loss or expense of owners of the salving vessel, unless the Court proceeds to apportion the award among the persons entitled to it, it may happen that part of that which was intended to recoup the owners of the salving vessel for their loss or expense, will go to persons who have no claim to it, the master and crew. An illustration of this appears in the case of *The Wilhelm Tell*,<sup>1</sup> where there was a pre-existing agreement between owners, master, and crew, as to the shares to be taken by them in an award, and the sum awarded had to be divided between them in accordance with the agreement, without any deduction in respect of the allowance given by the Court as compensation for the owners' loss and expense. A similar result may follow where, as in *The Saltburn*,<sup>2</sup> a judge, other than the judge who made the award, is asked to apportion it. In that case Mr. Justice Bruce was asked to apportion an award of £900 made by Sir Gorell Barnes, which sum included an allowance for owners' loss and expense; but, as Sir Gorell Barnes

<sup>1</sup> L. R. [1892], P. 337.

<sup>2</sup> 7 Asp. M. L. C. 474.

had not attempted to ascertain with any degree of exactness the amount of such loss and expense, and had made no special order respecting payment of it to the owners, Mr. Justice Bruce was compelled to treat the whole of the £900 as salvage reward proper, and to apportion it without making any deduction in respect of loss and expense. Further, where there are different sets of salvors working together, under an agreement between themselves as to the share which each is to have in a salvage award, and the vessel belonging to one set of the salvors is damaged in the salvage service, it may happen, under the present practice, that the allowance given for the damage incurred by the one set will be shared by all the sets of salvors. Underwriters may also be affected adversely by an award being made in the form of a gross sum. If they pay to the owners of the salving vessel the cost of repairs rendered necessary by reason of the salvage services, they ought, in justice, to be able to recover from the owners any amount which may be allowed by the Court as compensation for the cost of such repairs. But, unless the allowance of the Court is stated separately in the award, the underwriters cannot recover any portion of it, so that the owners will be recouped the cost of the repairs twice over, from the underwriters and by means of the award. It is clear, therefore, that the present practice has serious disadvantages. A return to the old practice of assessing the allowance for loss and expense under a separate head of the award, if it would involve more careful examination of loss and expense, would certainly prevent the injustice which has been shown sometimes to arise under the existing system. But, so far as can be seen, that is the only respect in which an alteration in the manner of assessing awards is at present practicable. "The many and diverse ingredients of a salvage service" are not to be found in the same number and degree in any two cases, and probably no two Courts would agree as to the

relative importance to be attached to them. It seems, therefore, that a salvage award must continue to be, as Lord Stowell once described it, "*rusticum judicium*."

A. R. KENNEDY.

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## VI.—LOCAL AUTHORITIES: PUBLICATION OF PROCEEDINGS.

A SUBJECT of considerable interest has been raised in the sphere of local municipal life by the posthumous delivery of Mr. Justice Kekewich's judgment in the case of *Mason v. The Mayor, Aldermen and Burgesses of Tenby*. This involves the consideration of the rights of the general public and of a particular limited public to obtain admission to the meetings of local authorities, and involves the consideration of the liability attaching to a local authority, or any member thereof, to actions for libel or slander, based upon the publication, either oral or written, of the proceedings of the authority.

Within the Metropolitan area the question of publication of the proceedings of local authorities has been raised in another form by the decision of various guardians, notably those of Islington and St. Mary Abbott's, Kensington, to refuse to allow their minutes and agenda papers to be placed in the public libraries of their respective districts for the benefit of the ratepayers, on the ground of a supposed liability attaching either to the Board or its individual members by reason of such publication.

Both matters involve the right of the public generally, or of a particular limited public, namely, the burgesses or ratepayers of any particular local authority, to attend the meetings and to have access to the records of what transpires, and the business transacted at the meetings of local authorities.

That such a right may exist contemporaneously with a right in the public authority to exclude from its proceedings on any special occasion all but its own members, is clear, both by the right of public access to the Courts of Justice and by the provisions of the Local Government Act 1894.

Any member of the public has a right to come into Court and be present at all its proceedings, subject to the higher right which resides in the Court itself to exclude in the public interest the public itself or any particular class of the public or any particular person. The right of the public constitutes the rule, and the exercise of the right of the Court the exception. Moreover, the ground upon which the exercise of such right may be resorted to by the Court is clearly ascertained and defined, namely, public interest.

The Local Government Act 1894, rule 13 of the second part of the Second Schedule, deals with parish councils and their meetings, and expressly provides that "every such meeting shall be open to the public," unless the council otherwise direct. Thus following the same principle as operates in respect of Courts of Justice. The question to be considered is how far this same principle is acknowledged or re-established in respect of other authorities.

For convenience of consideration in this respect, local authorities may be formed into three groups:—

Firstly.—The county councils, councils of county boroughs, and councils of municipal corporations which, other than the Metropolitan borough councils, are regulated in this respect by the provisions of the Municipal Corporations Act 1882 and the Local Government Act 1888.

Secondly.—The parish councils and rural district councils which are regulated by the provisions of the Local Government Act 1894, and certain provisions of the Public Health Act 1875, incorporated by reference with that Act.

Thirdly.—Urban district councils and boards of guardians, to which in this respect the Acts of 1882 and 1888 do not apply, and to which the provisions above referred to of the Local Government Act 1894 apply only in part. With regard to the councils of parishes, municipal corporations, and county boroughs, they may be said to continue or re-establish the old local meetings of burgesses in the Guild Hall and freemen of the old township assemblies. They are by no means simply statutory or administrative bodies, but have their roots deep in the past and possessed originally both powers of jurisdiction and of administration.

In the first group, the councils of municipal corporations are regulated only by the provisions of the Act of 1882. The Acts of 1888 and 1894 do not apply.

Of the Act of 1882, the material provisions are contained in (1) sect. 233, (2) sects. 22 and 23, and (3) the rules contained in the Second Schedule.

Sect. 233 relates to various rights and powers which are expressly conferred by the statute upon the public, the burgesses, and the ratepayers. Sects. 22 and 23, and the rules contained in the Second Schedule, relate to the meetings and proceedings of the council.

By sect. 233 the general public obtain no right, nor is any right recognised as existing in it, other than the right to inspect and take copies, under certain conditions, of the Freeman's Roll; but the section recognises a particular limited public in the body of burgesses and ratepayers, and on these the right to inspect and take copies, under certain conditions, of the minutes of the proceedings of the council—which are directed to be kept by sect. 22—and the abstract of the treasurer's accounts is respectively conferred.

By rule 5, contained in the Second Schedule, the legislature has provided that a general notice of every meeting

must be fixed to the Town Hall, and in certain cases also the business to be transacted thereat. By rule 6 it has provided that each member of the council must be personally and individually summoned to attend, and the business to be transacted must in every case be specified in the summons.

In framing these rules the legislature was not merely creating machinery, but confirming and re-asserting old time rights and practice, and it is to be regretted that the rights of ratepayers and burgesses, so far as they may be recognised as existing from old time, or may be inferred to arise from the provisions of the Second Schedule to the Act, rules 5 and 6, were not argued before Mr. Justice Kekewich in the *Tenby Case*; and that these provisions are only dealt with by him in regard to the rights of the general public; and that in the report of the proceedings in the Court of Appeal Lord Justice Buckley's judgment alone deals with the point, and seems only to suggest a doubt in his Lordship's mind. Rule 5 may have no application to the public generally, as decided by Mr. Justice Kekewich, and the location of the notice therein prescribed to be upon the Town Hall would indeed seem to restrict its application to the burgesses or ratepayers whose municipal life and interests alone centre there. But the point was not dealt with by Mr. Justice Kekewich, nor by the Master of the Rolls nor by Lord Justice Fletcher Moulton in the Court of Appeal. So far as any right of attendance at meetings of the council in the burgesses and ratepayers might be inferred to arise from the provisions of sect. 233, the maxim *expressio unius exclusio alterius* was applied by the Master of the Rolls to negative any such implication.

County councils and councils of county boroughs are dealt with by the Local Government Act 1888, and by sect. 75 the provisions of the Municipal Corporations Act 1882, ss. 22, 23, 233, and rules 5 and 6 of the Second Schedule above referred to, are applied to county councils and the councils of county boroughs. Similar notices, therefore,

as are required by rules 5 and 6 in the case of councils of municipal corporations, are necessary with respect to the meetings of these councils, and in all other respects in these matters, these Councils stand on precisely the same footing as those of municipal corporations under the Act of 1882, and must, therefore, be bound by the decision in the *Tenby Case*, so far as that decision concludes the right of the general public, or the right of the particular limited public of burgesses and ratepayers as recognised by sect. 233, to attend as of right the meetings of the council.

With respect to the second group, the Local Government Act 1894, rule 13 of the Second Part of the Second Schedule, deals with parish councils and their meetings, and expressly provides that every such meeting shall be open to the public unless the council otherwise direct. But the meetings of district councils, urban and rural, which are regulated by the same Act, are somewhat differently treated by the Statute. There is no such express enactment or recognition of public right in respect of these councils as in that of the parish council. But by sect. 59 (1) of the Act 1894, the provisions of sect. 199 and Schedule 1 of the Public Health Act 1875 are applied in the case of every urban district council other than a borough council, and of every rural district council and board of guardians, as if such district council or board were a local board. By these provisions, meetings of local boards and proceedings thereat shall be conducted in accordance with the rules contained in Schedule 1 of the Act 1875. And by Part 1 of the Schedule it is prescribed that every local board shall from time to time make regulations with respect to the summoning, place, *management*, adjournment of their meetings, and generally in respect to the transaction and management of their business.

By the Local Government Board Circular, 24th December, 1894, the attention of all rural district councils was

called to the provisions of the Act, and the effect which these will have upon the Orders then in force relating to the several matters dealt with in the Schedule is explained; and on 22nd December, 1894, by a similar circular, the attention of all urban district councils other than borough councils was directed to the provisions of the Act.

It would seem, therefore, that the right of the general public, and also of any particular limited public, to attend the meetings and proceedings of such local authorities is by implication limited, and must depend upon the regulations and bye-laws drawn up from time to time for the purpose of regulating the notice and management of the meetings, and will vary according to the views prevailing in each locality, and in each local authority as from time to time constituted.

It may, however, be doubted whether any such right exists in respect of these mere administrative statutory bodies, apart from such as may be given by the regulations or bye-laws of the particular local authority. And this doubt is increased by the *obiter dictum* of the Master of the Rolls in the *Tenby Case*, where he is reported to have grouped for these purposes, all such district councils as of the same class as councils of counties, county boroughs, and municipal corporations. It must, however, be borne in mind that the question of the respective rights of the public, and of the ratepayers, of such district councils, was not before the Court in this case, and that sect. 59 (1) of the Act of 1894 was not cited to the Court, nor was any reference to sect. 199, Schedule 1 of the Public Health Act 1875, made. It is clear that these provisions must distinguish the case of all such district councils from those councils which are regulated in these matters by the Acts of 1882 and 1888, and to which these provisions do not apply, and, therefore, that the *Tenby Case* cannot be said to have decided these questions with regard to district councils.



So far, therefore, as these councils in groups 1 and 2 are concerned, it is established:—

(1) That the general public have a statutory, perhaps also an old-world Common law, right of attendance at the meetings of parish councils, but that the council may on occasion, according to its discretion, restrict the oral publication of its proceedings by conducting them *in camera*.

(2) That by sect. 58 (4) of the Act 1894, every parochial elector has a right, without payment, to inspect and take copies of all books and documents (Minute Books included) belonging to the parish council, and that therefore the council has no power to restrict such publication of its proceedings so as to exclude the right of any member of such a particular or limited public.

(3) With respect to district councils, urban and rural: That no statutory right of attendance at the meetings and proceedings of these councils is created or recognised as existing, either on behalf of the general public or of any limited or particular public; That these councils have a complete discretion to make bye-laws regulating such matters, and so to control and limit the oral publication of their proceedings; That by sect. 58 (5) of the Act of 1894 every parochial elector in a rural district has a similar right to inspect and take copies of all books and documents belonging to the rural district council as he has in respect of a parish council; And that therefore any such rural district council has no power to control such publication of the matter and business transacted at its meetings; That no such provision is made with respect to the books and documents belonging to urban district councils.

In regard to urban district councils, it should be noted that these are not subject to the provisions of the Municipal Corporations Act 1882 in this respect, and that therefore if the right of the elector or ratepayer is in all these cases merely the creature of Statute, no such right of inspection

and copying exists, and all access to the books, minutes and documents of these councils is denied to the public, whether general or particular.

(4) With respect to county councils, councils of county boroughs, and councils of municipal corporations; That these are governed by the *Tenby Case*, and have an absolute discretion as to any and what oral publication of their proceedings shall be permitted; That every burgess has a right for payment to inspect and take copies of all minutes of proceedings of such councils; And that such councils have no power to limit such publication of their proceedings.

The position with respect to the meetings and proceedings, and the records of such meetings and proceedings of boards of guardians, these stand upon a somewhat different footing to those of any other local authority.

Prior to the Local Government Act 1894, these were regulated by the provisions of the General Consolidated Order (Unions), 24th July, 1847—issued by the Poor Law Commissioners of that date. These provisions were, however, considerably modified by the Local Government Act 1894, s. 59, sub-s. (1), and the explanatory circular of the Local Government Board, 20th Dec., 1894. By these the provisions of the Public Health Act 1875, s. 199, and Schedule I, were applied to boards of guardians as if such boards were local boards.

Boards of guardians are free from the provisions in these respects of the Acts of 1882 and 1888 above referred to on the one hand, and from the like provisions of the Act of 1894 relating to right of attendance and right of inspection and copying of books and documents on the other. And in these respects are in a like position to urban district councils, except so far as the provisions of the General Consolidated Order (Unions) 24th July 1847 still apply; and that all ratepayers have a statutory right to attend at the general audit of such boards.

But unlike all other local authorities with regard to which, in these respects, until the *Tenby Case*, there was no judicial authority whatever, the rights and obligations of the boards of guardians have more than once come under judicial review.

The two leading cases upon which the advisers of the Metropolitan boards of guardians have grounded their opinion are those of *Purcell v. Sowler* (2 C. P. D. 215) and *Pittard v. Oliver* (L. R. [1891], 1 Q. B. 474). Both these actions are founded in tort, and in them damages for defamation was sought to be recovered for the publication of defamatory matter contained (in the case of *Purcell v. Sowler*) in a report by a local newspaper of the proceedings of a meeting of a board of guardians; and in the case of *Pittard v. Oliver*, contained in a speech of a member in the course of a discussion arising upon the business of the board, other persons than members being present at the meeting with the permission of the board.

These two cases, raised with regard to boards of guardians all the issues raised by the present controversies, viz.: the right of attendance at such meetings of members of the general or particular and limited public; the discretion of the guardians to allow or prohibit such attendance; the effect upon the plea of privilege, in an action for defamation, of the presence with the consent of the board of persons other than the members of the board, and drawn (a) from the general public; (b) from a particular limited public, where the action is brought against a person being a member of the board for the original publication; or against a person not being a member for a subsequent publication of the matter complained of.

These two cases have been cited by the legal advisers of the Metropolitan boards of guardians as authority establishing the liability of the boards or of individual members to actions for defamation, the subject-matter of which has

been published by the admission of persons other than members to their meetings, or by the subsequent publication of the minutes of their proceedings by issuing them to the local public libraries.

In fact these cases establish the very reverse, and in so far as they recognise with regard to guardians the right of every board to create its own audience, by admitting or excluding strangers from their meetings, other than the general audit according to discretion, proceed upon the same basis or principle, as the Court applied in the *Tenby Case*, with regard to councils of municipal corporations, counties and county boroughs. And show clearly that a member of such a board is completely protected for what transpires at the meetings of that board from any such consequence, owing to the privilege which attaches to the occasion upon which the publication took place where the strangers who were present at the meeting were admitted with the knowledge and consent of the board. The guardians then, though under no statutory obligation in this respect, have power to create their own audiences, and as Chief Justice Cockburn, in *Purcell v. Sowler*, finds, generally do so, by admitting the public. Yet the Court recognises that this admission in no way deprives the board or its individual members of the protection of the privilege attaching to the occasion, by reason of the duty which rests upon it and them to deal with the matters under discussion.

The original publication is held to be privileged, by the Court both in *Purcell v. Sowler* and in *Pittard v. Oliver*, and the same principle is applicable to all those local authorities which are governed by the *Tenby Case*, or who have a statutory discretion in such matters entrusted to them.

The immunity of such local authorities and their individual members has been clearly established by Lord Esher, in *Pittard v. Oliver*, where he lays down three principles, the defendant being a member of the board, viz. :—*Firstly*,

that if the words had been spoken at a meeting where only guardians were present the occasion would be privileged; *Secondly*, that if there were other persons present, not being members of the board, and these were ratepayers, the privilege was not taken away by their presence: and *Thirdly*, that if there were other persons present, not being members of the board or ratepayers, it would make no difference where such persons were allowed to be present by the guardians as a body, the individual members not inducing nor being able to contest the presence of such persons. Clearly, publication by a board of guardians or other local authority in like circumstances, at its meetings, to any or all the ratepayers constituting its public, does not expose any of its members to any of the dangers suggested by the legal adviser of the Islington Board of Guardians.

But is a subsequent publication by the local authority equally protected? The question can only apply to boards of guardians and councils of urban districts, among those local authorities which are under consideration. All others whose proceedings are governed by the Acts of 1882, 1888, and 1894, are under statutory obligations to permit such publication of their minutes and proceedings within the circle of their own particular public. With regard to urban district councils there is no statutory obligation—no judicial authority. They stand, however, in the same position as boards of guardians. With regard to these the judgment of Lord Justice Mellish, in *Purcell v. Sowler*, deals with the point, and establishes the principle that any publication prior or subsequent to that of the meeting of members of the business to be or having been transacted at the meeting, by a guardian to any ratepayer or parishioner, would be protected as privileged, upon the ground of the respective duty and interest which each has in the matter. So also in *Pittard v. Oliver*, the judgment of the whole Court is based upon the same principle, viz., the respective duty of the

guardian or guardians and interest of the ratepayers in the discussion of the matter. But where the matter, though justified upon the original publication, has yet no interest for the general public, it has been held that subsequent publication to the general public in a newspaper is not a publication to which the protection of privilege would extend. It was upon this ground that the decision in *Purcell v. Sowler* was based, and the newspaper proprietor held liable.

These cases clearly establish the immunity of local authorities, or their individual members, from any liability to actions of defamation where the publication complained of is confined to such a particular limited public as is constituted by its body of burgesses, electors, or ratepayers, and the issue by them of agenda papers and minutes of proceedings to such a limited public would clearly be within their protection. Neither within the same principles would the libraries committee render itself liable by such a publication. Powers for restricting the use of such documents are conferred upon such committees by the Public Libraries Act 1901, s. 3 (1), enabling such committees to make by-laws for regulating the use of the library and the contents thereof. These powers have already been exercised to some extent, so as to discriminate one portion of the contents from another. Reference libraries, reading rooms, and lending libraries have been established, and have been subjected to different regulations, while some are open to all the general public—others are only available to ratepayers. Therefore there can be no difficulty in practice in limiting the right of access to the minutes and agenda of local authorities to the ratepayers or burgesses of the local area.

These are matters which cannot fail to arouse considerable interest in all spheres of municipal life. Publicity depends upon publication, and publicity is essential to good

administration. For the good of the local authorities, the ratepayers and the public, such decisions as in the *Tenby Case*, and such actions as that of the Metropolitan guardians, should not be allowed to pass unquestioned, in so far as they tend to limit the rights of the public.

HARRY C. BICKMORE.

## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### The Guarantee of Sweden.

AT the close of the Crimean War, it was thought wise indirectly to limit the activity of Russia towards the North, since she had been forced to accept a position of express inferiority in the Black Sea, and might probably seek compensation elsewhere. In consequence, a short treaty was concluded at Stockholm in 1856, by which the Allied Powers guaranteed the integrity, as against Russia, of the dominions of the King of Sweden and Norway. In return, the latter monarch engaged to give them timely notice if any movements were attempted by Russia to secure a hold, by persuasion or force, on any part of his territory. The bearing of that agreement, in the light of recent events, has been much canvassed in the past winter. Norway has broken away from Sweden; and the united monarchy has thereby lost territory which was peculiarly the occasion of the joint guarantee. More than that, the weaker kingdom has secured a new guarantee from four powers: Russia, France, Britain and Germany. We discussed recently the question of the general bearing of the dissolution of the Union, and came to the conclusion that, from an international standpoint, it amounted merely to a loss of territory by the monarchy; its rights and duties,

except as regards the territory so lost, remaining absolutely unaffected. In other words the United Kingdoms formed a single entity, of whose peculiar internal composition other countries were not bound to take cognizance. The benefit of its treaties remained when it lost Norway, just as the benefit of Great Britain's treaties would remain if it lost Ireland. Stress has been laid, in support of the contrary assumption, on the fact that, in such treaties as the Sugar Convention of 1902, the sovereign contracted "for Sweden" or "for Norway" individually. But the force of such contentions disappears when it is remembered that the peculiar form so adopted is almost a necessity in such a case. A general treaty to which a number of Powers are parties, and which bears on some commercial subject, is here acceded to by a sovereign whose States in fact form separate economic units. But it is only acceded to in respect of one of these units. The obvious way of avoiding extreme awkwardness and repetition in the body of the treaty, is to express once for all that it is acceded to by that sovereign for that part of his dominions which is meant to be affected by it. It is "the King of Sweden and Norway" who contracts; and it cannot be suggested that for a breach of the treaty the united monarchy would not have been jointly liable. No valid argument can be drawn from the conclusion of such engagements in favour of the existence of Norway as an international power previously to the events of 1905.

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The Norwegian guarantee is a far more extensive one than that secured in 1856 by the united monarchy. It is not only not solely directed against Russia, but it has the concurrence of that power. Its terms are reported to be as follow :—

Animated by the desire to ensure to Norway, within her present limits and with her neutral zone, her



independence and her territorial integrity, as well as the benefits of peace, the co-signatory Powers have resolved to conclude a treaty to that effect, and have appointed as their respective plenipotentiaries [*here follows an enumeration of the plenipotentiaries*], who, after having communicated to each other their full powers, found to be in good and due form, have agreed to the following:—

Article I.—The Norwegian Government undertakes to cede no part of Norwegian territory to any Power either by way of occupation or by way of any arrangement.

Article II.—The German, French, British, and Russian Governments recognize and undertake to respect the integrity of Norway. If the integrity of Norway is menaced or infringed by any Power, the German, French, British, and Russian Governments undertake, after a previous communication to that effect from the Norwegian Government, to furnish, by means considered the most appropriate, their support to the Government with a view of safeguarding the integrity of Norway.

Article III.—The present treaty is concluded for a period of ten years from the day of exchange of ratifications. Should the treaty not be denounced by one or the other party at least two years before the expiry of the said period, it will remain in the same manner in force for a fresh period of ten years, and so forth. In the event of the treaty being denounced by one of the Powers which participated with Norway in the conclusion of the present treaty, this denunciation will only have effect in regard to that Power.

Article IV.—The present treaty shall be ratified and the ratifications shall be exchanged at Christiania as soon as possible.

It will be seen that this treaty has two features in which it compares unfavourably with the Swedish treaty from the point of view of the guaranteed Power. It is terminable; and it is limited by the preamble to the case of Norway continuing to possess its present territory. If, in its enthusiasm for Home Rule, Norway were to grant independence to any of its provinces, the treaty would seem, if this were pressed, to fall to the ground; or if Norway were to receive a cession of territory from Russia, Denmark or Sweden, the same consequence would appear to follow. It might plausibly be urged, in the latter case, that the possession of its original territories could no longer be guaranteed to Norway when it had assumed duties and responsibilities extending beyond them. So, if Norway annexed Spitzbergen, it might plausibly be argued that the guarantee was no longer binding. It is expressly directed to the state of affairs in which Norway retains, and no more than retains, its present limits. Probably, however, such a line of argument would put too great a strain on the preamble. Since Norway does not promise to refrain from extending its borders, or from granting independence to any part of its territories, whilst it does expressly promise not to cede any, the more likely construction of the preamble is that it is intended to emphasize that only the present limits of Norwegian rule are guaranteed, and that further acquisitions are outside the scope of the agreement.

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Whatever the undertaking means, it cannot affect the rights of Sweden. As king of a monarchy, which, whatever its constitutional composition, appeared as a single entity to the outside world, the predecessor of Oscar II was guaranteed against any encroachment of Russia by the treaty of 1856. The guarantee remains valid and subsisting. It was not made conditional on any continuance of the precise

state of things as they existed in the year of its signature. It must have been contemplated that changes were natural and possible, even probable. If it had been desired to limit the operation of the treaty so as to make Sweden lose her guarantee if she lost her Norse territory, the negotiators would certainly have said so. No treaty would ever be safe, if considerations of fluctuating circumstances are admitted in order to enable a nation to repudiate its engagements. But the hasty assumption in some quarters that the treaty is "obsolete" or "out of date," has led to the canvassing of proposals for securing afresh the interests of Sweden. \*

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### The Baltic Question.

One such *ballon d'essai* was a scheme, gravely propounded in a leading journal as on the *tapis*, for the neutralisation of the Baltic Sea. (This, by the way, would leave Göteborg vulnerable.) The great precedent for such suggestion is, of course, the well-known declaration of the Armed Neutralities. It is a declaration which, like other vaguely humanitarian manifestoes, is far from being consistent or intelligible. The widespread and ready acceptance which it received from interested parties cannot weigh for a moment against its absolute failure to secure observance from anyone whose interest lay in a contrary direction. Nor can it be made consistent with itself. "*La mer Baltique est une mer fermée . . . où toutes les nations doivent et peuvent naviguer en paix et jouir de tous les avantages d'un calme parfait.*" A close sea which is open to the navigation of everybody is a flat contradiction in terms. Probably the liberty of navigation which the authors of the Declaration meant to concede was only the precarious right which had been recognised by Grotius under the name of *jus transitus innocui*. So read, the claim

of the northern Powers is nothing more nor less than to annex the Baltic. Historically, there was something to be said for the claim. Loccenius tells us that in his day "*Reges Sueciæ et Daniæ à tempore memoriam hominum excedente habent et exercent imperium oceanî marisque Baltici,*" which Hall takes to amount to a sharing of the Baltic between these Powers. Sufficient weight is hardly given by the English writer last cited to the words immediately following of Loccenius,<sup>1</sup> "*quatenus intra ditiones eorum fluit, vel litora alluit.*" The qualification limits the *imperium* of Denmark and Sweden to those parts of the Baltic which are actually under their subjection, or wash their coasts. And indeed the proposition could not well be extended further, for Loccenius recognises that the Poles and Scythians possess the eastern coast of the sea, and it would be impossible to say whether Denmark or Sweden was here in possession. A much better ground for the Declaration is to be found in the right of Denmark—(which was admitted up to a very recent date)—to control the passages leading to the waters of the Baltic and to exclude vessels from traversing the Sound. This would, however, rest the Declaration entirely on the right of Denmark: and at the present day those rights have been released.

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However grounded, the declaration of a close Baltic was put out by the King of Denmark in May, 1780; and he added that he would not permit the entry of vessels of war into that sea.<sup>2</sup> Calvo (sect. 2501), seems to be in error in asserting that a similar interdiction was issued by Russia, or that it was contained in the Empress Catherine's proclamation of the principles of the Armed Neutrality. The French Court "having nothing more at heart than to do what might be advantageous and agreeable to neutral Powers,"

<sup>1</sup> *De Jure Maritimo*, I, 4.

<sup>2</sup> De Martens, *Traité*, III, 175, *et passim*.

readily accepted this Danish note,<sup>1</sup> but it found no favour in London. It was embodied in a treaty (28th June, 1780), between Denmark and Russia, by which latter Power it was no doubt originally inspired; and again, in a treaty (21st July, 1780), between Russia and Sweden, though it does not appear to have been mentioned in the general treaty of Armed Neutrality, which was also signed by the non-Baltic Powers. It was, however, accepted by Prussia in a treaty with Russia of 8th May, 1781, the recitals in all three treaties bearing that the parties—“*sont toujours également intéressées à veiller à la sûreté et à la tranquillité de la Mer Baltique, et à la mettre à l'abri des troubles de guerre et des courses des armateurs—système d'autant plus juste et plus naturel, que toutes les puissances dont les Etats l'environnent, jouissent de la plus profonde paix.*” An accidental isolation, depending on the peculiar geographical situation of Denmark, was thus taken advantage of to support an assertion that the Baltic was the private property of the riparian States, and even that it was in some mysterious fashion dedicated to perpetual peace. The Danish Court put forward as the ostensible motive of its declaration the necessity of preserving the channels between its territories from warlike disturbance. Such a reason was manifestly insufficient to justify the closing of the entire Baltic, and it does not appear in the Russian treaties, which adopt the Danish King's doctrine as an axiom while ignoring his reasons.

It is not very easy to say what the Northern Powers imagined was to happen to the pacific Baltic if two of themselves were at war *inter se* (as all three shortly were). Nor is it in the least clear whether they meant to assert a faint control over the whole Baltic, or to divide that sea up, like Poland, amongst them. Nor can we say whether they expected the world to allow its shores to become an

<sup>1</sup> *Ibid.*, p. 176.

inviolable arsenal, from whose eastern shores armaments might gather unchecked, for operations against a Britain or a Japan. Fortunately, the hazy theory adumbrated by the Russian Court in 1780 has never received the least practical respect. British and French fleets sailed in and out of the Baltic in the wars which attended the opening and the middle of the nineteenth century, without so much as a protest being raised; and, in the latter case, with the full concurrence of the Swedes. The principle does not appear to have been revived at the time of the Armed Neutrality of 1800; and it must be regarded as a mere chimera at the present day.

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### Foreign Stamps.

We can hardly think that the House of Lords was right in attaching so little weight as it did to the arguments of Lords Justices Farwell and Moulton in the Court below, in *Commissioners of Inland Revenue v. Maple & Co. (Paris) Ltd.* (L. R. [1908], A. C. 22). An English Company carrying on business in Paris proposed to transfer its assets situate there to another English Company formed *ad hoc*. The transfer was effected by a document drawn up in the French language, couched in French legal phraseology, and executed in France. But the consideration for the transfer was the allotment of shares in the new company to the old one. This necessitated an issue of shares in England, and registration of the bargain there; and on this slender ground the instrument of transfer has been held liable to stamp-duty as on a conveyance in England. One can hardly think that a conveyance of, say, French land could be held to require an English stamp because the price was made payable in London.

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Walton, J., and Collins, M.R., held that the English stamp is necessary whenever the instrument relates to

anything to be done in England. The former considered that, nevertheless, the stamp was not here needed. For, although the *consideration* related to matters to be done in England, the actual transaction which the document embodied—namely, the transfer of the goods—did not do so. The statement as to how the price was to be paid was superfluous, and could be disregarded. Collins, M.R., thought, on appeal, that it could not: and he held the document taxable. Moulton and Farwell, L.JJ., took an entirely different line. Their view is, perhaps, best expressed in the judgment of the former. He gives a brilliant analysis of the general structure of the Stamp Act (1891), and notes that sect. 1 (which is couched in perfectly general terms, obviously demanding restrictive interpretation) is the only section which expressly imposes any charge. Then, he observes, there are penal provisions of varying natures, and, above all, the disabling sect. 14, sub-sect. 4, which renders an instrument “relating, wheresoever executed, to any . . . matter or thing done, or to be done, in any part of the United Kingdom” inadmissible in evidence, unless duly stamped. The Lord Justice points out that this subsection does not add a single document to the list of those that have to be stamped: it merely imposes a certain penalty on unstamped documents falling within the carefully scheduled classes of instruments for which a stamp is essential. “Nothing can be more striking than what I may term the reckless breadth of this definition, and the precise and careful provisions and delimitations” to be found in the operative sections and schedules. This section, with its broad reference to “anything to be done in England,” must therefore be set aside as mere ancillary machinery, in estimating, *au fond*, what documents are taxable. And then we are thrown back on the unqualified operative words of sect. 1 and the definition in sect. 54 of “conveyance on sale”; which must clearly have some local limitation.

That limitation cannot be got from sect. 14, sub-sect. 4; "no canon of construction is equal to effecting this." Such an attempt would be an attempt, not to construe sect. 54, but to "import into it limitations which are not there." Construing sect. 54 alone, the learned Lord Justice finds that it has no reasonable application to a transfer of property effected in France of property situate in France.

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"The fallacy of the argument of the Commissioners is that they neglect a fundamental rule of construction in the case of fiscal Acts.

"In the absence of express language to the contrary, such Acts must be read as applying to the country of the Statute itself, and not to the world outside . . . . Unless this is borne in mind in construing such an Act, it becomes sheer nonsense. The whole world would every hour be drawing up invalid documents and incurring penalties by the tens of thousands. The Statute would amount to an enactment that every dock warrant, every receipt given . . . . in every part of the world, and every 'conveyance on sale' of land wherever situated, should be executed on stamped paper from Somerset House, or should bear British stamps. All this absurdity arises from the neglect of the principle of construction to which I have referred."

Lord Macnaghten, however, found the case "very plain and simple"; and Lords Ashbourne, James and Atkinson, without expressing any reasons, agreed that the instrument was taxable. The noble lord (Macnaghten), asked why sect. 14, sub-sect. 4, should not be referred to as showing what sect. 54 means, without giving any clear reasons why it should; and, having once imported the language of sect. 14 into the construction of the latter section, he had no difficulty in finding some reference to England in the instrument before him.



### Foreign Judgments.

It will be remembered that in *Sirdar Gurdyal Singh v. The Rájá of Faridkót* (L. R. [1894], A. C. 670), certain principles were laid down by Selborne, C, as governing the recognition of judgments given abroad and sued upon in England. These (contrary to what was suggested by Blackburn, L.A., in *Schibsby v. Westenholz*) did not include the case of a judgment rendered in the *forum speciale obligationis*, or in the forum of the country where the defendant possesses property; not even when these *fora* coincide. They are strictly limited to the cases of a personal jurisdiction over the defendant, created by his nationality, residence, domicile or consent (and perhaps submission). This restrictive treatment has been studiously followed in *Emanuel v. Symon* (L. R. [1908], 1 K. B. 302). The facts were somewhat singular. The question was complicated in appearance, though not in reality, by the fact that the dispute was one which related indirectly to land within the foreign jurisdiction. A partnership for working mines in W. Australia was entered into by the parties. The plaintiffs obtained from the Australian Court a decree for dissolution, a sale of the assets, and an account. The sale was carried through, a balance struck, and judgment entered for them against the defendant for £1,281:4s. 11d. They sued him in England upon this decree, and Channell, J., gave judgment in their favour on the artificial ground that by entering into such a partnership agreement as that in question he had implicitly agreed to submit all differences arising out of it to the W. Australian Courts. This would plainly have amounted to a virtual recognition of the *forum speciale obligationis* in a very broad fashion. The Court of Appeal, reversing this, declined to recognize the jurisdiction of the colonial tribunal. Little weight was attached in either Court to the fact of the agreement being one for partnership in

the ownership and management of West Australian land. Agreements relating to land are in an ambiguous position. Some authorities consider that they are so closely bound up with the actual dealings with the land effected in pursuance of them, that they must, to avoid conflict, be regarded as proper subjects for the law and the Courts of the territory. Others see no reason why the agreement should not be governed by one law and referable to one tribunal, and the consequential dealings with the land governed by and referable to another law and another tribunal. In the case of a contract-like partnership, where the contract may operate as a conveyance, it would seem highly desirable that it should be governed by the same rules as those relating to conveyances. But the difficulty arises, that a partnership agreement, unless it be surprisingly narrow, must go beyond the mere dealing with the land, and will include many purely personal matters, which need not necessarily be best regulated by the *lex soli*. At the same time, one would have welcomed some discussion of this consideration by the Court, for the case was undoubtedly a strong one in favour of the recognition of the local jurisdiction, if possible.

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### Bankruptcy.

It is difficult to guess why the adjudication order was made, or what it was supposed to operate on in *In re Macfadyen & Co.* (L. R. [1908], 1 K. B. 675). The head-note, with some departure from verbal accuracy, speaks of the "firm" being bankrupt in India and England. A firm cannot be bankrupt. And it is doubtful to what extent a partner, especially if domiciled abroad, is affected by an act done in England by the business agents of his firm, which would be an act of bankruptcy if done by himself in person. However, an act of bankruptcy was supposed to have been committed in the present case, constructively or otherwise, by the

partners (British subjects) of a firm carrying on business in London and India. This act occurred on October 20th, a creditor's petition was presented on October 22nd, a receiving order was made on the 27th, and a trustee appointed on November 7th, 1906. Meanwhile, on October 22nd, 1906, the debtors obtained the benefit of the Imperial Act 11 & 12 Vict., c. 21, which regulates insolvency in India. The Madras Court made an order on that day under sect. 7 of the Act; and thereby, under the authority of the Imperial Parliament, "all the real and personal estate and effects of the petitioners, *whether within the territories within the limits of the charter of the East India Company or without . . .*" vested in the official assignee for the time being of the said Court. How, under these circumstances, there was anything for the English order of adjudication to operate on, and why it was thought necessary to ask the English Court to authorise an agreement between the Indian assignee who had a statutory title to all the English assets, and the English trustee who had a title to nothing, for an English distribution of surplus assets among English and Indian creditors, it is hard to understand. The scheme of the Act is obviously equal distribution and unity of administration. In sect. 43 it is provided expressly that, in case there are extra-Indian creditors, the assignee is to retain one-third of the assets and invest them under the control of the Court, under whose directions they are to be eventually applied, "so as to place all the creditors of the said insolvent, whether Indian, or British or Foreign, upon a just and equal footing, and so as that every creditor whose claim shall be admitted or established *in the said Court* shall receive a rateable and proportional part of the assets of the said insolvent, according to the amount of his debt, without reference to the time at which such debt shall have been claimed." The effect is to establish unity of administration—and that administration the Indian.

### Property in Neutral Prize.

It is not easy to answer the arguments of counsel for the appellants in *Andersen v. Marten* (L.R. [1908], 1 K. B. 601). The case was discussed in *L. M. & R.*, Vol. XXXII, p. 475, when the opinion was expressed that the seizure of a neutral ship does not transmute the property, and that for insurance purposes there cannot be said to be a loss because it is practically certain that there will be a loss. The point could not have been better put than it was by Hamilton, K.C., and Balloch, that—"There is no reason for making the condemnation date from any earlier period than that of the actual sentence. It is the sentence of condemnation that divests the property. There is a distinction between the right to arrest and bring to trial the property of a neutral, and the right to 'loot' the property of an enemy. A belligerent is not allowed to take the law into his own hands and destroy the property of a neutral."

A German vessel's owner insured his disbursements upon her, excepting the risk of capture. She was captured by the Japanese, and sustained a total loss by wreck when in their hands: after which condemnation proceeded in the Japanese Prize Court. The Court, affirming Channell, J., declined to say whether the property was transmuted by seizure—(though they evidently inclined to think it was)—and they rested their judgment on the ground that, even if it was not, the ship was nevertheless "lost by capture" before she struck. Cozens-Hardy, M.R., adopted Channell, J.'s language, and fell back on the popular arbitrament of the casual passer-by, as "sufficient to dispose of the case": "I think that most people, looking at the matter from a common-sense point of view, and apart from technicalities, would say that, under the circumstances, the owner lost his ship by capture, and that the Japanese captors afterwards lost their prize by shipwreck" (p. 607). Moulton, L.J.,

agreed, and paid a further compliment to the "plain, common-sense man" who, he was persuaded, would have no hesitation in taking that view.

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When Judges rely on popular impressions, it is not disrespectful to bear in mind that they may perhaps be relying on popular fallacies. The fallacy here, it is submitted, lies in the confusion of "capture" with "loss by capture." The ship had undoubtedly been captured, and the passer by, who does not trouble himself to analyse events, may possibly pronounce her to have been lost by capture, since she was then as good as lost, the verdict of the prize-court being *à posteriori* certain. But it does not seem that this is a legitimate inference. Suppose a ship to be drifting on the rocks in a heavy sea, with no help near. She is certain to break up in five minutes. But as she touches the ground her boilers, from inherent defects, explode. Is this a loss by stranding? It seems to us that it is merely a case where an apparently inevitable loss by wreck is suddenly and unexpectedly prevented, to the relief of underwriters. And in the case under discussion, what really happened, unless the property was transmuted by seizure, was that an apparently inevitable loss by capture was prevented by a supervening shipwreck.

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The judgment can be supported, and is best explained, on the ground that the policy excepted not capture alone, but "capture, seizure and detention, and the consequences of hostilities." It was clearly "in consequence of hostilities" that the vessel was taken out of the control of her own people and navigated towards Yokosuka, where she met heavy weather and was beached by the Japanese.

T. BATY.

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## VIII.—NOTES ON RECENT CASES (ENGLISH).

THOUGH the Court of Appeal has in *Oppenheimer v. Attenborough and Son* (L. R. [1908], 1 K. B. 221), affirmed the decision of Channell, J., noted in Vol. XXXII, No. 334 of this Magazine, it can hardly be said that the combined judgment is a strong one, though the Court were unanimous in dismissing the appeal. As the controversy turns mainly upon the meaning of the first sub-section of sect. 1 and of sect. 2 of the Factors Act it is to be regretted that the Court were not of one mind also on the interpretation. The Lord Chief Justice holds that the words of sect. 1, which define a mercantile agent, were inserted because there are agents of various sorts; and some of them, such as auctioneers and carriers have no authority from the customary course of business to pledge goods consigned to them. And to the words of sect. 2 which authorise a pledge by one acting in the ordinary course of his business as a mercantile agent, his Lordship assigns the meaning that the pledge is good if the agent has acted as a mercantile agent would act; in such a way, for instance, as that the business must be done in business hours in business places. And Buckley, L.J., agrees generally with this rendering. But Kennedy, L.J., does not feel quite sure upon the question of the exact effect of the words of the section, and reserves to himself the right of considering on some future occasion what they mean. Then, again, as regards the validity of a pledge of goods by an agent who obtained them by larceny by a trick, the Lord Chief Justice holds that the point still remains open whether the agent could in such a case be said to be in possession of the goods with the consent of the owner. While Kennedy, L.J.,—but only in the limited case of the agent being found guilty of the offence—justly considers that it is difficult to hold that the Legislature intended that a man who had been

so convicted can be presumed to have had possession of the goods with the owner's consent. The strong point in favour of the dismissal of the appeal by force of the Act, in face of evidence that there is no custom in the diamond trade for a diamond broker to be empowered to pledge, is the improbability of it ever having been meant by the Legislature that a custom of a quite limited business, and that custom known to only a still more limited circle outside the business, should invalidate a pledge by an agent, of goods put into his possession for sale, while the owner's absolute prohibition to him to pledge them, would have no such effect.

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*Curtice v. London City and Midland Bank, Limited* (L. R. [1908], 1 K. B. 293), may be received with still more doubt, notwithstanding the eminence of the judges who decided the case. A telegram to a bank, professing to come from a customer, countermanding a cheque, may of course be a forgery, and in some circumstances the bank might be prudent and justified in declining to act upon it. But it is quite different if the bank's own carelessness, and that alone, stands in the way of communicating with the drawer, and probably of obtaining from him within banking hours a verification of the telegram. What makes the case still more strong against the bank is, that this carelessness quite obscured the significance of a special enquiry, as to what was proposed to be done with regard to the cheque, from the bank into which it had been paid. Presumably, if the telegram had been opened at the proper time a reply to the enquiry would have been delayed till, at any rate, an effort had been made to reach the drawer. If the decision stands, it might practically make a telegram inoperative in such cases, and would, in most, support a bank in disregarding a countermand by such a medium.

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The judgment in *De la Bère v. Pearson, Limited* (L. R. [1908], 1 K. B. 280), justifies in part the misgivings with which it seems to have been delivered. If a newspaper, to increase its circulation, invites from its readers applications for financial guidance, it is no doubt bound to exercise care in the advice it gives; and not, for instance, to recommend as a good stockbroker a person who is not, in the accepted sense, a stockbroker at all. So far the judgment is right. It is right also as regards the plaintiff's claim for the amount of money (£800), which he named as the sum about the investment of which he relied on the experience and sagacity of the paper. But as to the liability of the paper for the further sum which, with such unhappy consequences, he entrusted to the person to whom he was so recklessly handed over, the doubts of Bigham, L.J., will be appreciated; though abstract justice would maintain the decision as it stands.

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Probably the remark of the Master of the Rolls in *In re a Debtor; ex parte the Debtor* (L. R. [1908], 1 K. B. 344), that the appeal "raises points of law of, to me at least, very considerable difficulty in the first instance" referred only to his first acquaintance with the facts before *Belshaw v. Mary Ann Bush* (11 C. B. 191) had been cited to him. In that case, which was heard as long ago as 1851, the defendant demurred to a plea as bad, on the ground that it admitted that a bill of exchange taken from him by the plaintiff on account of a debt had been indorsed by the plaintiff to a third person in whose hands it was outstanding at the time of trial. And Maule, J., in an elaborate and considered judgment, supported the demurrer. But the decision in the present case extends, as the incidents extend, further than the earlier one, for here the debtor, against whom judgment had been signed, gave a bill for the amount due which the creditor indorsed and handed to his bankers, with



whom his account was overdrawn beyond the amount which the bill represented. The bill on presentation by the bank was dishonoured, but the bank pressed their rights so far as to obtain a small sum from the debtor. Then came the fatal point of the case. The creditor served a bankruptcy notice for the balance, and the bank—but not till a fortnight after the notice had expired—handed the bill back to the creditor, who then petitioned for a receiving order under the judgment, alleging as the act of bankruptcy non-compliance with the notice served; and the registrar made the order. Usually the course of a receiving order is smooth, unchecked and inexorable as the wheels of Fate; but in this instance a deadlock ensued. The appellants objected that the petition was inoperative, as the bill was outstanding at the time the notice expired. The Court, as to the effects of the outstanding bill, followed *Belshaw v. Bush*, and, as a consequence, the receiving order was annulled; for the bank at the times the bankruptcy notice was served and exposed were the legal owners of the dishonoured bill, could have sued on it, and would have been entitled to the full amount that could have been recovered, as it fell short of their claim on the creditor for his overdraft. Consequently, the creditor had no rights whatever, for the effect of giving a bill is a conditional payment. If a receiving order could be enforced for non-compliance with a notice served, while a bill given for the amount of the judgment debt was, though dishonoured, in the hands of a third party, a debtor might, if his creditor went bankrupt, be liable to pay twice over; for the fact that he had paid to the debtor himself the debt for which the bill was given would be no answer to a *bond fide* holder of the bill for value.

T. J. B.

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In our issue of August 1906, at p. 477, we strongly questioned the decision of the majority of the Court of Appeal, in *West Leigh Colliery Company Limited v. Tunnicliffe & Hampson Limited* (L. R. [1906], 2 Ch. 22). The decision turned on the proper mode of assessing damages arising through surface subsidence caused by removing the subjacent minerals. Swinfen-Eady, J., had held that all the surface owner was entitled to recover was the amount of the actual injury which had occurred up to the time the action was launched. This decision the Court of Appeal (Romer, L.J., dissenting) reversed, holding that the proper measure of damages was the depreciation in the market value of the surface. That amounted to giving damages not merely for the actual but also for the anticipated injury. This certainly has never been the Common law mode of estimating damages, though when an equitable remedy, such as an injunction, is sought, and the Court gives, under Lord Cairns's Act, damages in lieu of it, it is the mode adopted in equity (see *Shelfer v. City of London Electric Lighting Co.*, L. R. [1892], 1 Ch. 287). Now (L. R. [1908], A. C. 27) the House of Lords have unanimously reversed the decision of the Court of Appeal and restored the judgment of Swinfen-Eady, J.

In *Fear v. Morgan* (L. R. [1907], A. C. 425) it was recently held that a lessee can, under sect. 3 of the Prescription Act 1832, acquire against his lessor a right of light over adjacent land belonging to his lessor. Now, in *Hyman v. Van Den Bergh* (L. R. [1908], 1 Ch. 167), it has been held that he can decline to acquire for the benefit of his lessor a right of light over adjacent land not belonging to his lessor. Under sect. 3, as read with sect. 4, a right of light, however long enjoyed in fact, only becomes indefeasible upon action brought and proof being given that it has in fact been enjoyed for twenty years immediately before the action.

Accordingly, if a right of light is in fact enjoyed for many years, the lessee may practically put an end to it by agreeing with the owner of the adjacent land to pay a rent for the light. Then it is enjoyed with the consent of such owner, and on the determination of the lessee's interest the lessor will be unable to establish his right, since he cannot show that the light was enjoyed without the consent of the adjacent owner during the whole twenty years immediately before action brought.

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Another interesting case on prescription is *Lord Chesterfield v. Harris* (L. R. [1908], 1 Ch. 230). There Neville, J., held that the tenants of a manor may acquire by prescription a free fishery, or common of fishery, in a river within the manor; and that such right is not bad because it is without stint or because with the sub-division of the tenants' lands the number of persons entitled to exercise the right of free-fishing may be indefinitely increased.

The right of a *cestui que trust*, or other person in a fiduciary position, to get accurate and clear accounts from his trustee, has lately been frequently before the Court. Thus in *In re Fish, Bennett v. Bennett* (L. R. [1893], 2 Ch. 413), it was held that no agreement between co-trustees as to costs of legal work prevented the *cestui que trust* from having such costs investigated. Again, in *In re Skinner, Cooper v. Skinner* (L. R. [1904], 1 Ch.), where accounts supplied by the trustees made no distinction between the income and corpus of the trust estate, proper accounts were ordered at the cost of the trustees. And in *In re Linsley, Cattley v. West* (L. R. [1904], 2 Ch. 785), where the acting trustee failed to give proper accounts, these were ordered at the cost of the trustees, but an indemnity was given to the passive trustee at the expense of the acting trustee. Now in *Cheese v. King* (L. R. [1908], 1 Ch. 245), where for twenty-five years the

*cestui que trust*, who was a builder, was financed by his solicitor, and where during all these years no proper account of costs was delivered, but the amount due to the solicitor in respect of them was agreed from time to time, the builder on proof that he had no independent advice, and that before the Mortgagees' Legal Costs Act 1895, the solicitor had charged profit costs in dealing with mortgages where he himself was the mortgagee, was allowed to re-open the accounts, though the solicitor was then dead, and the transactions between him and the builder were almost entirely wound up. The judge (Neville, J.), thought the case a hard one, but the decisions left him no alternative.

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Another example of a rule of equity which sometimes acts very inequitably is seen in *Ponsolle v. Webber* (L. R. [1908], 1 Ch. 254). By a rule of the Stock Exchange, where a broker, for an undisclosed outside principal, pledges shares with a jobber to be redeemed next settling day, if the broker fails to redeem them on settling day and is hammered, then the jobber is bound to take over the shares at the official price of the day. In this case, such a transaction took place, and as the undisclosed principal did not put the broker in funds, the shares were taken over by the jobber. Subsequently they rose in value, and the jobber sold at a profit. Held, that the rule "once a mortgage always a mortgage" applied, and that the undisclosed principal was entitled to an account against the jobber.

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Solicitors should observe that the etiquette of the profession does not limit the rights of their clients. In the absence of express instructions to the contrary from the client, a solicitor who in employing counsel follows etiquette is safe; but he is not in following it against such express instructions. That is the purport of *In re Harrison* (L. R. [1908], 1 Ch. 282). Another point is, that the fact that

a rule of etiquette is expressly promulgated by the Bar Council, with the approval of the Attorney-General and the Incorporated Law Society, and published in the *Annual Practice*, does not make it any more binding on the client.

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When people say now-a-days that a married woman is the spoilt child of the law, they are thinking usually of the equitable doctrines, such as restraint upon anticipation and the statutory alterations, which have resulted in the domestic position which enables a wife to say to her husband in effect, "What's yours is mine, and what's mine is my own." But the Common law which has been so bitterly denounced for its subjection of married women to their husbands, was not without its compensations. When it is said that marriage at Common law made the wife's property the husband's—a statement never correct—it is seldom added that it also made her debts his. It is forgotten too that it made, and to this day makes, her torts his, and to a large extent her crimes also. How far it was from making her realty his property is shown by *Johnson v. Clark* (L. R. [1908], 1 Ch. 303). It required her consent to any alienation of her realty by her husband, and on the assumption on which her whole subjection to him was based, namely, that she was the weaker vessel, it surrounded her with its protection as to giving that consent. It declared that, to make such consent effectual, she must be separately examined to ascertain that she consented freely and not under the coercion of her husband. That principle is so strongly established that a special custom of a manor to the contrary is void as against the policy of the law. (*Ibid.*).

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The policy of the law, of course, renders express conditions, as well as special customs contrary to it, void. An example, of one so held is given in *In re Beard* (L. R.

[1908], 1 Ch. 383). The condition of a gift there was that it should be forfeited if the donee entered the military or naval services of the country.

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If the case of *Sprange v. Lee* (L. R. [1908], 1 Ch. 424) is well decided, then the restraint on a married woman's power of alienation is very much in danger. There a married woman was entitled to an annuity from her husband. He commenced an action for divorce, which was compromised by a deed by which she purported to release him from the annuity, and covenanted that neither she nor anyone else would take proceedings to recover it. She took no proceedings, died before him, and by her will directed her debts to be paid. Her personal representative sued the husband for the arrears of the annuity, and he counter-claimed for the breach of the covenant not to sue. Neville, J., held that the counter-claim was good. Surely, if ever there was a covenant contrary to the policy of the law, a covenant to deprive a married woman of the protection the law gives her, is one.

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The doctrine laid down in *Ewing v. Orr-Ewing* (L. R., 10 App. Cas. 453) is, that where an action is brought against a trustee in England as respects a trust of property out of England, the Court will stay it if there is a competent Court in the country where the property is situated, and it is more convenient to the parties that the action should be tried there. But note, that more than mere inconvenience is necessary to stay the action here. The inconvenience of some of the parties must be so great as to give the other parties an unfair advantage if it is tried here. See *In re Norton's Settlement*, *Norton v. Norton* (L. R. [1908], 1 Ch. 471).

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J. A. S.

## IRISH CASES.

A pretty crux on the co-relation of the Public Authorities Protection Act and Lord Campbell's Act came before the Court of Appeal in *Gawley v. Belfast Corporation* ([1908], 2 Ir. R. 34). An action against a public body, arising out of an act done in pursuance of some public duty is barred, under the Act of 1893, after six months from the "act, neglect or default" complained of. But suppose that the act complained of is one causing the death of A., which occurs more than six months after such act, and that upon A.'s death B. brings an action under Lord Campbell's Fatal Accidents Act, is B.'s action also barred? And is it barred, even if A. had himself brought an action in his lifetime, which is pending at his death? The facts in the present case raise this net point. In June 1906, a man was injured by a collision with a tramcar belonging to the defendant corporation; in July 1906, he sued them for negligence; in February 1907, that action still pending, he died of his injuries: in April 1907, his widow sued the Corporation under Lord Campbell's Act. The defendants plead that her action is not maintainable, as not having been brought within six months of the act of negligence. Is this plea good? The Court of Appeal say that it is, disregarding the tempting argument that the widow's cause of action under Lord Campbell's Act was a new one, arising only on the death, and constituted not merely by the negligence, but by the negligence *plus* the death, and that you cannot well hold a cause of action to be barred before it has arisen. They founded their decision, first, on the words of the statutes, both of which speak of the "act, neglect or default" causing the injury, as the period from which the time of limitation is to run; and second, on *Williams v. Mersey Docks Board* (L. R. [1905], 1 K. B. 804). That case, a decision of the Court of Appeal in England, is not actually on all-fours with the

present, but certainly is fairly close to it. The plaintiff's husband was injured in 1902; he died in 1904, and the widow sued in 1905: it was held that as the deceased could not, if alive in 1905, have sued, his widow could not. In the present case, however, the deceased had actually an action pending when he died, and it is the fact that that action died with him, which causes the hardship.

Hard cases may make bad law by repulsion, as well as by attraction. A Court is sometimes so anxious to prevent itself being led to a decision in the direction of its sympathies that it goes to the other extreme. Without saying that that has happened in this case, it will be interesting to see how the House of Lords treats the matter, if, as seems probable, it has an opportunity of considering it.

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*Kelly v. Hopkins* ([1908], 2 Ir. R. 84), is a fresh illustration of the wide stretch given to the notion of "dependency" under the Workmen's Compensation Acts. Practically, the law seems to be that if A. is legally liable to contribute to the support of B., that raises a presumption that B. is dependent on A., and it requires very strong facts to rebut that presumption. The present case decides that it is not rebutted (B. being A.'s wife) by the fact that B. before A.'s death has been removed to a lunatic asylum as a dangerous lunatic, and is at the date of the death in fact maintained there by the asylum authorities. B. is nevertheless "totally dependent" on A.'s earnings for the purpose of the Act. It was suggested that the case was ruled by *Rees v. Penrikyber Nav. Coll. Co.* (L. R. [1903], 1 K. B. 259), where a pauper in a workhouse, to whose maintenance no contribution was in fact made by his son, was held not in fact dependent on the son's earnings, notwithstanding the son's liability to contribute to his father's maintenance. The Court, however, thought that the authority really applicable was *Williams v. Ocean Coal Co.* (L. R. [1907], 2 K. B. 422), where a wife



was held "dependent," although she was at the time of her husband's death employed as a domestic servant, and he had not in fact contributed anything to her support for two years before his death. In short, dependency is coming more and more to be a pure question of law: it is only a presumption, but a very strong one.

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What is the effect of a condition of sale providing that an abstract of title is to be delivered "immediately?" In *re Todd and McFadden's Contract* ([1908], 1 Ir. R. 213), decides that at all events such a condition is not satisfied, when a sale takes place on December 30th, by a delivery on the 5th January; apparently the delivery should have been, if not on the day of the sale, at least on the following day. And when there is a further condition that requisitions are to be furnished within four days from the delivery of the abstract, the purchaser is released from this condition by the vendor's non-compliance with the condition as to immediate delivery, and the vendor cannot refuse to answer requisitions furnished a week after the abstract was received. The cases applicable are *Upperton v. Nicholson* (L. R., 6 Ch. 436), and *Southby v. Hutt* (2 My. & Cr. 207): "If a vendor does not himself comply with the terms specified, in that case the time for taking the objections, and the mode in which they are to be considered as waived, should depend on the general principles of the Court."

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The familiar principle that only in exceptional cases will the Court grant specific performance of a building contract, is illustrated by *Rushbrooke v. O'Sullivan* ([1908], 1 Ir. R. 232). Here the agreement was to take down, rebuild and repair such portion of the premises as plaintiff's architect should direct; under his direction and to his satisfaction. It was held that a breach of this agreement could only be remedied by damages, and not by a decree for specific performance.

The limits of the exception to the general rule are shown by *Wolverhampton Corporation v. Emmons* (L. R. [1901], 1 K. B. 515), and the distinguishing feature of that case was, that a subsequent agreement specified in all particulars the buildings to be erected. Here there were no plans, particulars, or specifications. In other words, the Court will not in such cases make a decree for specific performance unless it can see exactly what it is ordering to be done.

J. S. B.

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### SCOTCH CASES.

Among the Scotch cases of last quarter, two may be noted as bearing upon Maritime law. In *Crown Steamship Company Limited v. Leitch* (45 S. L. R. 402), a bill of lading provided that the goods were to be received by the consignee "as fast as the steamer can deliver, any custom of the port to the contrary notwithstanding, and all charges incurred after being discharged necessary for the steamer's quick despatch to be paid by the owner or consignee of the goods." The goods were discharged on to the quay by the shipowners, but the consignee was unable to keep pace with the delivery by having them run into the sheds, so as to prevent the quay being blocked and the ship's delivery impeded. The shipowners assisted the consignee in removing the goods and now sued for the expenses incurred. The case of *Hulthen v. Stewart & Company* (L. R. [1903], A. C. 389), was pleaded in defence, but the Court distinguished that case from the present in respect that here there was a special contract which should be given effect to, apart from any claim to demurrage; and upon an interpretation of the special contract it was held that the consignee could not plead as a cause of delay the weighing of the cargo before shedding, though that was the usual custom of the port, nor any unusual or unforeseen quickness of delivery by the ship.

In reference to the latter point, it was proved that the consignee had been previously advised of the probable rate of delivery. The shipowners were therefore held entitled to recover their outlay to a reasonable amount.

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The other maritime case was that of *Clan Steam Trawling Company Limited v. Aberdeen Steam Trawling Company Limited* (45 S. L. R. 462). Here also the case turned upon a special contract which set aside the ordinary rule of Maritime law. The respective owners of two vessels were each insured with the same Mutual Insurance Company, the constitution of which provided, *inter alia*, that "steamers insured in this association bind themselves to give assistance to any vessel insured in this association," or in certain other specified associations, "it having been arranged that the vessels in these associations shall be bound in like conditions, and that the compensation for services rendered be decided and determined by the committee of the association or associations in which the vessels were insured." One of the vessels having rendered salvage services to the other, the owners of the salvor claimed to be entitled to salvage from the owners of the vessel saved. They pleaded that the rules of the insurance company did not exclude claims for remuneration for salvage services. The Lord Ordinary (Salvesen) repelled the defenders' preliminary plea founded upon contract, and allowed a proof. In doing so, he referred to the decision of Lord Stowell in the case of the *Zephyr* (2 Hagg 43), which, however, he did not consider as laying down an absolute rule apart from the special circumstances in which the question arose. On appeal to the Second Division this judgment was reversed. The Lord Justice-Clerk was of opinion that the Lord Ordinary had erred in treating this as a case of salvage. The whole tone of the authorities in regard to salvage is to be found in the

expression "voluntary." Services to be rendered by one vessel to another in distress are services for which salvage is exigible when the service is not one of contract or obligation except in the sense of duty or moral obligation which the law cannot enforce. The moral obligation applies on land as well as at sea, and in any case it applies chiefly to persons and not to corporeal subjects. In the opinion of the Court, the word salvage did not apply to services which those rendering them had by contract undertaken to render.

In *Morrisson v. Robertson* (45 S. L. R. 264), the owner of two cows having failed to sell them at a public market, withdrew them from the sale-ring and was thereafter approached by a man who represented himself to be the son of a person he knew to be of good credit and to whom he had formerly sold cows. The owner of the cows thereupon concluded a bargain of sale on credit and gave delivery. The statements of the buyer turned out to be false, he not being the son or in any way connected with the person he named. The fraudulent buyer afterwards re-sold the cows to a third person who acted *in bonâ fide* and paid the price. The facts having come to the knowledge of the original seller, he sued the third person for the cows or their value, and was held entitled to recover. The judgment of the Court contains an interesting *résumé* of the legal effect of fraud, and of the distinction between a void and a voidable contract. Lord Kinnear quoted with complete approval the observations of Lord Chancellor Cairns in the House of Lords, in *Cundy v. Lindsay* (L. R. [1878], 3 A. C. 459). After pointing out that if the chattel has been found by the person professing to sell, the purchaser will not obtain a good title, and in like manner there is no title where the chattel has been stolen, Lord Cairns goes on to say, that if the chattel has come into the hands of the person who professed to

sell it by a *de facto* contract which has purported to pass the property, the purchaser will obtain a good title, even although it should afterwards appear that the original owner was entitled to reduce the contract as obtained by fraud. A contract so obtained is not void but voidable, and rescission may come too late if in the meantime third persons have acquired rights in good faith and for value. If, however, there was no contract with the true owner, the purchaser can obtain no better title than the person from whom he acquired who, *ex hypothesi*, had no title at all. In the opinion of the Court the case under notice came under the last-mentioned rule. The seller never intended to contract with the person who made the false representations, but with an entirely different person with whose agent he was led to believe he was transacting. It was further pointed out by Lord Kinnear that the law laid down by the Scottish institutional writers was in exact accordance with the law expressed in the English cases, and reference was particularly made to the statements of Lord Stair (*Inst.*, iv, 40, 21), and Mr. Bell (*Prin.*, sect. 527).

R. B.

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## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*The Yearly County Court Practice for 1908.* 2 Vols. By Judge WOODFALL and E. H. TINDAL ATKINSON, assisted by W. R. BRIGGS, LL.B., and H. C. FENTON. London: Butterworth & Co.

This work is as usual divided into two volumes. The first deals with General Jurisdiction and Jurisdiction in Admiralty, together with the Rules and Forms. The second volume deals with Enactments conferring Special Jurisdiction upon the County Courts. The first volume is naturally of considerable size, as, all told, there are very nearly 1,700 pages. This may be partly accounted for by the size of the Index, which is a remarkable feature of the work; it is very full and extends over very nearly 400 pages. Of the various headings contained therein, "Workmen's Compensation Act 1906" covers 10½ pages, and "Workmen's Compensation Rules 1907" over 16. In comparison with this the chapter devoted to the Workmen's Compensation Act 1906 is comparatively short, being only about 45 pages. We turned eagerly to find if any new light was thrown on the much-discussed question of "casual," but were disappointed, as all we found was, "It would be of no practical use to forecast the definition which will be given to the term here used of 'casual' employment. It is submitted that the question is one of fact dependent on the circumstances of each case." There is no notice of the doubt raised by some commentators of the Act as to whether domestic servants are included in the definition of workman. The second volume deals with a great variety of Statutes, which are conveniently grouped under five heads. These are, Statutes—I. Providing for the Recovery of Penalties; II. Providing for the Recovery of Moneys other than Penalties; III. Providing Special Machinery for the Settlement of Disputes; IV. Conferring an Administrative Jurisdiction; V. Authorising enquiries to be made in the public interest. This will give an idea of how wide the range of a County Court Judge's duties are, and how much labour is required of the Editors of a work like the present to keep up with the growing law on so many subjects. The principal additions are parts of the Merchant Shipping Act 1906, and the Companies

Act 1907, and of the Public Trustee Act 1906 and the Rules made thereunder. We do not think very many additional duties have been thrown on the County Court Judges, but so far as we can see their burden has been in no way lightened, and under the contemplated Licensing Act they will have the same duties as under the Act of 1904. Not the least important chapter, that on Costs, has been re-written and enlarged by Mr. Harry Cousins, whose extensive experience as Registrar of the Cardiff County Court eminently qualifies him for the task.

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*Legal Essays.* By J. BRADLEY THAYER, LL D. Boston: The Boston Book Company. 1908.

These Essays by the late Mr. Thayer, who was Professor of Law at Harvard University, will sustain the high standard we are accustomed to expect in the literary productions of the law professors of the great American Universities. There is considerable diversity of subject, and they range over many years. The most important from the point of view of an English lawyer is an elaborate examination of that part of the Law of Evidence concerning "declarations," and in it is discussed with great ability and learning whether they are in any sense part of the *res gesta*. As it appeared in the *American Law Review* in 1880 and 1881, it will be seen that it is not quite up to date. It was suggested by the well-known controversy between Chief Justice Cockburn and Mr. Taylor, over the *Beddingfield Case*, and although a good deal of the discussion has been rendered more or less obsolete as regards our Courts by the decision of *R. v. Lillyman*, yet it well repays careful perusal. We find an interesting Address on the Teaching of English Law at Universities. He is rather severe, however, on our law books.—"The number of really good English law treatises—good, I mean, when measured by a high standard—is very few indeed. They improve; and yet to a great extent to-day, the writers and publishers of law books are abusing the confidence of the profession and practising upon its necessities." We are, however, glad to say he excepts from this condemnation Pollock and Maitland's *History of English Law*, and the works of Dicey, Holland, Markby, and Pollock. Another paper contains an appreciative review of Dicey's *Law of the Constitution*, and an interesting examination and criticism of the illustrations Professor Dicey drew in his chapter on Parliamentary Sovereignty and Federation from the general Government of the United States.

He describes the book as "a new and first-rate addition to the literature of this subject." We should also like to call attention to the sincere appreciation of the labours of the late Professor Maitland, and the praise so justly and generously bestowed on his editing of *Bracton's Note Book*. Though not dealing with subjects with which we are familiar, some of the Essays on American constitutional questions should be read and studied. The first one, for instance, deals with a subject which always seems rather strange to us—the American doctrine which allows to the judiciary the power to declare legislative Acts unconstitutional and to treat them as null. This power in many cases is not expressly given, but seems to have arisen from the result of "political experience before the War of Independence—as being colonists, governed under written charters of government proceeding from the English Crown." Another interesting constitutional proceeding commented on is that of "Advisory Opinions," or the taking of the opinions of the judges by the executive or legislative department. This is limited to the constitutions of four States, and seems to have arisen from the old usage of the English constitution, by which the King and the House of Lords had the right to demand the opinions of the Judges. In England these opinions, of which two well-known instances can be given in *Queen Caroline's Case* and *McNaghten's Case*, have no authoritative quality, and after a careful examination of the practice Mr. Thayer comes to the conclusion that the same is the case in America. There are other Essays which we might notice if we had the space, but we hope we have said enough to call the attention of our readers to this scholarly addition to juridical literature.

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*The Laws of England.* By the Right Hon. the EARL OF HALSBURY and other Lawyers. Vol. I. London: Butterworth & Co. 1907.

This is the first volume of a very important publication which attempts to do no less than supply a complete statement of the Law of England at the present time. We can best explain its aim and form by quoting from the Introduction written by Lord Halsbury. "The result is not a mere encyclopædia, it is not a mere collection of cases, but a number of treatises composed by learned lawyers, supported by the decisions of the great judges who have from time to time adorned the English Bench: and it is hoped that when



finished the work will furnish a complete statement of the Laws of England." The Introduction also contains an interesting sketch of the various attempts made, by Commissions and otherwise, to codify the Laws of England. At this moment we can recollect no other great lawyer who has filled the office of Lord Chancellor devoting his well-earned leisure after retirement to strictly legal literature, except Lord St. Leonards, and his case was somewhat different. We do not quite understand how the work will differ materially in its nature from such a well known publication as the *Encyclopædia of the Laws of England*, which also contains a number of treatises composed by learned lawyers and supported by the decisions of great judges, and the headings of which are similarly arranged—alphabetically. It is true that it has not the advantage of a portrait of the learned Editor, and its pages are not gilt edged. We do not find it stated in the Publishers' announcement how many volumes the work is likely to fill, but we believe it is expected to be about twenty. The present volume contains some eleven Titles, contributed by a variety of eminent lawyers. The first one is "Action," by Master Bonner, assisted by Messrs. Henry Stephen, H. L. Ormsby, E. A. Cohen, and F. R. Bush. Those following are, "Admiralty," by the Right Hon. Sir Gainsford Bruce and Messrs. C. F. Jemmett and E. S. Roscoe; "Agency," by Judge Evans and Messrs. M. R. Emanuel and A. W. Baker Welford; "Agriculture," by Judge Austin and Mr. J. Brooke Little; "Aliens," by Messrs. W. Ernst-Browning (late a Judge in Jamaica), W. Haldane Porter (an Inspector under the Aliens Act), and G. B. Gedge; "Allotments," by Messrs. A. Macmorran, K.C., W. Addington Willis, and S. W. Clarke; "Animals," by Judge Baugh-Allen and Messrs. C. W. Williams and E. T. H. Lawes; "Arbitration," by Sir Reginald M. Bray (Judge of the High Court) and the Hon. Malcolm Macnaghten; "Auction and Auctioneers," by Judge Tindal Atkinson and Mr. H. Martley Given; "Bailment," by Messrs. A. Powell, K.C., and Wyatt Paine. The concluding Title, "Bankers and Banking," is by Sir John R. Paget, Bart., K.C., who is the only contributor who seems to have tackled his subject single-handed. The list, it will be seen, comprises a Judge of the High Court, an ex-Judge of the High Court, a retired Colonial Judge, several County Court Judges, King's Counsel, and well-known contributors to legal literature. Whatever may be said on the desirability of Judges and County Court Judges contributing to legal literature which may be quoted before them, there can be

no doubts as to their competency in this particular instance. Each Title has prefixed to it a Table of Contents, the whole volume is divided into numbered paragraphs, and there is a full Index at the end. The work done seems to be worthy of the reputations of the Authors. The Title "Bankers and Banking" has struck us as particularly clear and good. In the Title on "Animals" is collected a great variety of information from many sources. The Title on "Arbitration" is also a good one. In fact, the whole contents of this volume promises well for the usefulness and success of this great and important work.

*The Companies Act 1907.* Annotated by D. G. HEMMANT, with Notes on Practice by H. W. JORDAN. London: Jordan & Sons. 1907.

*Company Law and the Law of Limited Partnerships.* By J. R. McILRAITH. London: George Routledge & Sons. 1908.

*The Companies Act 1907 and The Limited Partnerships Act 1907.* By E. A. WHITEHOUSE and A. C. T. VEASEY. London: Horace Cox. 1907.

**Second Edition.** *Principles of Company Law.* By A. F. TOPHAM, LL.M. London: Butterworth & Co. 1908.

Whenever a new Act on any important subject is passed, it is an axiom that many new editions, text books and handbooks, may be expected thereon. The new Companies Act of 1907 forms no exception to this rule, the only difficulty being to classify the merits of each individual work. Mr. Hemmant has taken his labours seriously, and has submitted a treatise which displays some considerable research. Both the new Act and the Companies Act of 1900 are printed in full, with notes to each section. This system presents many advantages, as it enables the practitioner to look up a point with considerable rapidity. Mr. Herbert W. Jordan has compiled the Notes on Practice with considerable skill and knowledge.

Mr. McIlraith takes the other line, and in his able little handbook traces the birth, life, and death of a company in all its phases. No doubt his work will be very useful to the layman, for whose use it is undoubtedly intended.

For the same purpose is intended, no doubt, the result of the joint labours of Messrs. Whitehouse and Veasey, both of whom are solicitors of the Supreme Court. The printing of the pages in two

columns, headed "The Companies Act 1907," and "Previous Enactments affected thereby" respectively, is a novelty which makes for easy reference.

The fact that Mr. Topham's treatise on the Principles of Company Law has run into a second edition shows that law students; for whose use it is intended, appreciate his efforts. As one of the Readers appointed by the Council of Legal Education, he should be fully cognisant of what is required to explain the fundamental principles in a lucid and easily understood form. A perusal of his book shows that the learned Author has acquitted himself well of his task. The work under review forms one of the "Hornbook" Series, published by Messrs. Butterworth & Co., and described as a series of Text-books for Law Students.

*The Companies Act 1907 and The Limited Partnerships Act 1907.* By Sir FRANCIS BEAUFORT PALMER. London: Stevens & Sons. 1908.

**Tenth Edition.** *Company Precedents*, Part III: Debentures and Debenture Stock. By Sir FRANCIS BEAUFORT PALMER. London: Stevens & Sons. 1907.

As a member of the Departmental Committee of the Board of Trade (1905-6), apart from any other consideration, Sir Francis Palmer can speak with great authority on the new Companies Act, which was the outcome of the Report this Committee presented. As an authority on Company Law, the learned Author's name has become a household word. The manner in which the matter is dealt with, is shown by a very careful table fronting page 1, giving the arrangement of sections. In the first place, the new Act is given in full, each section being fully annotated. The Companies Act of 1900 is then dealt with in a similar manner, and finally comes the Limited Partnerships Act of 1907. Limited Partnerships are well known in the United States, but in this country, lawyers are practically unacquainted with such a legal entity. In the Introduction, the learned Author shortly points out the principal features of the 1907 Act, and demonstrates the directions in which it affects the 1900 Act. The annotations throughout are lucid, and are quite in the Author's best vein of terseness and directness. Occasionally, one sees a personal opinion driven home with a vigour which is quite refreshing, although from one less capable of expressing an opinion it might be resented, personal opinions being generally

out of place in a treatise on *Law*. The Index is comprehensive, and is a sure guide to the text. The present work is quite worthy of the Author's fame, and will take its place on every lawyer's book-shelf together with the other text-books on Company Law from the same source.

It is hard to find new phrases of commendation for the new edition of Part III of *Company Precedents*, as most that is worth saying has already been said. Perhaps the highest compliment is to quote the proud boast of the Author that he "has good reason to believe that by far the greater part of the debenture stock securities aforesaid now outstanding are framed in close accordance with the forms originated by him for the various editions of *Company Precedents*." One can also join with him in saying, that this fact is "a reassuring testimony that his labours have not been in vain." Sir Francis Palmer has again been fortunate in procuring the assistance of Mr. Edward Manson and Mr. F. Evans in bringing out the present edition. These two names are familiar to any one who appreciates the work of Sir Francis Palmer in the field of Company law. All the intervening decisions have been carefully noted up, and the effect of the new Act upon the subject under discussion duly recorded. The Table of Cases is complete, the Table of Chapters and Forms gives a complete map of the subject-matter in the text, and the Index shows most careful preparation. Matter that was present in former editions needs no praise, matter that is new in the present edition has been handled in a masterly manner. In conclusion, it need only be stated that the present edition is quite equal to former ones, and when that is said, further comment is superfluous.

*Bombay in the days of George IV. Memoirs of Sir Edward West.*  
By F. DAWTREY DREWITT, M.A., M.D. London: Longmans,  
Green & Co. 1907.

In these days, when so many voices claim for their owners the credit of building up the British Empire, it is refreshing to read of the quiet, sturdy work done with that object in far back times, by a distinguished lawyer. The present book is intended to be a vindication of Sir Edward West, who was Chief Justice of the King's Court during its conflict with the East India Company. Sir Edward West is known to the world chiefly as a distinguished political economist, and for the first time is his work as a reformer of the abuses which existed in India eighty years ago fully recognised.

Prior to the arrival of Lord William Bentinck in 1828, India, as administered under the old charter of "John Company," must have been in a parlous state. Lord William was responsible for many reforms for which the distinguished subject of these memoirs paved the way, reforms which moulded the renewed charter given in 1833. Thuggism was rife and practically unpunished; suttee bore the stamp of official recognition. The Press had no freedom worthy of the name, and editors who made themselves obnoxious to the Powers that be were transported with impunity. The conditions of life being unhealthy and monotonous, it is not to be wondered at if officials sought to make their money as quickly as possible and depart. Those who know the present condition of India will stand aghast at the sordid picture painted in the pages of this book. If true, one can only feel a great satisfaction that times and conditions are very much altered. From early in February 1823, when he arrived in Bombay, down to 1828, when he died, Sir Edward West had a hard life. It was as recorder of Bombay he was first appointed, and then became the first Chief Justice. A short but descriptive account is given of the work of Sir Alexander Johnston (not Johnstone as therein spelt), the famous Chief Justice of Ceylon, and also of Sir Stamford Raffles, creator of Singapore, but better known as the founder of the Zoological Gardens, Regent's Park. The book is well and brightly written, the Author having a direct descriptive style. It will prove quite an instructive addition for those who have a library devoted to the history of India.

*The German Civil Code.* Translated by CHUNG HUI WANG, D.C.L. London: Stevens & Sons. 1907.

After reading the Historical Introduction to this work, one is struck with the idea that Germany must be a great place for lawyers. The client consults his legal adviser upon some difficulty, and what has to be done before a solution can be arrived at? (1) The State law; (2) The Imperial customary law; (3) The local customary law; (4) The Civil Code; must all be consulted. Let us hope that the fees are commensurate with the labour involved. The history of German law is much the same as that of any European country. In 1495 the Roman law was the Common law of the land. Roman law was, however, modified by the Customary law then in vogue in the particular vicinity. Thus, within what is now the Empire, there were six districts, each having its own system of law, some

of which were written in German, some in Greek, some in Latin, and some in Danish. This position was not to be tolerated long, after the Confederation of the German Empire. Each system of law had its schools and its adherents, all of whom engaged in wordy warfare. Savigny, the famous jurist, founded one school, and Thibaut was the leader of the opposing faction. After being submitted to many Commissions of famous lawyers, amongst whom was numbered Windscheid, so well known to Roman-Dutch jurists, the pure gold of the present Civil Code was evolved from the crucible of criticism and controversy. The third reading of the Bill passed the Reichstag on July 1st 1896, the Bundesrath on July 4th, receiving Imperial sanction on August 18th. Formally promulgated on August 24th, it did not take effect throughout the length and breadth of the German Empire until January 1st 1900. In the production of this work the learned Author has had the assistance of many men well known in the legal world, not least of all Dr. E. J. Schuster. On reading through the Code one is struck by the fact, that many of the leading principles of Roman law have been conserved. Notably is this apparent in that important branch of law, the status of the individual, also in other departments too numerous to quote within the limits of a review. The appendices will be found most useful to the English reader, dealing as they do with German technical terms, and a translation of English law terms into German. The Index and general "get up" of the book are quite praiseworthy, the volume not being too bulky in size. Generally speaking, Dr. Chung Hui Wang is to be congratulated upon producing a work, which although it may not have a large reading public, will undoubtedly prove a welcome addition to the library of the international lawyer.

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*Colonial Laws and Courts.* By A. WOOD RENTON and G. G. PHILLIMORE, B.C.L. London: Sweet and Maxwell. 1907.

This volume is intended to be a kind of stopgap between the last edition of Burge's *Commentaries on Colonial Law* and the edition which is in course of preparation. It is divided into three Parts. Part I deals with the different systems of law underlying the jurisprudence of the legal world. In this Part the history of Roman-Dutch law strikes us as being particularly complete and instructive. In Part II we have the Juridical Constitution of the British Dominions exclusive of the United Kingdom. In this connection

it should be mentioned that, under the heading of Natal: Political History, the date 1834 would probably be more correct than 1830, as there given. In 1834, in consequence of reports brought back by Dr. Smith and his party as to the fertility of Natal, Piet Uys and other Dutch Colonials went there and settled. There were undoubtedly English colonists settled in Durban Bay at the time, but Piet Uys and his party are the people evidently intended to be described as "Cape Colonists discontented with the Cape Government." Appeals to the Privy Council are treated of in the third Part, and a table is attached giving the conditions under which appeals from the Dominions beyond the Seas are possible. This table should prove of the greatest possible assistance to practitioners before the Privy Council. The list of Assistant Editors comprises many well-known names, including that of Dr. Bisschop, the recently appointed lecturer in Roman-Dutch law. Undoubtedly this volume will be used by those who cannot afford the luxury of the more pretentious Burge's *Commentaries*, as it gives much the same information in a very condensed form. That the information is reliable is proved by the long list of gentlemen, versed in the different laws in force in all parts of the Empire, who have revised or assisted in the preparation of the text.

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**Second Edition.** *The Merchant Shipping Acts.* By ROBERT TEMPERLEY, M.A., and H. STUART MOORE, assisted by A. BUCKNILL, M.A. London: Stevens & Sons. 1907.

The law of Merchant Shipping, or at any rate the legislation relating thereto, was in 1894 consolidated in the Merchant Shipping Act of that year, which reached the portentous length of 748 sections, making it one of the longest, if not the longest, of Statutes. After this effort, as might be expected, the subject was allowed to rest for a while, and though Acts were passed in 1897, 1898, and 1900, they only dealt with a few isolated matters. However, now the Merchant Shipping Act 1906, introduced by Mr. Lloyd George, has made such extensive changes, a new edition of this work became necessary. Something like a hundred cases on the subject had also been decided since the passing of the 1894 Act, and the vast number of cases before that Act were and still are for the most part of authority, and have therefore to be considered in each new edition. The work consists mainly of the two Acts to which we have referred, with a very careful system of notes and cross-references; and a prominent feature, and one we consider of great value and importance, is the

Appendix, which contains Orders in Council and Rules and Regulations of various sorts and of various authorities. These last must be of great practical value, and not always very accessible. A useful addition is the Comparative Table of Sections and Schedules of the Merchant Shipping Act 1894 and the Acts consolidated with it. There seems to be a curious omission in the 16th section of the Act of 1906. The section, which apparently replaces the repealed section 291 of the 1894 Act, imposes a penalty of £500 for each offence on the master of any ship who carries passengers on more than one deck below the water line, but does not provide any procedure for the recovery of this fine. The procedure under section 680 of the 1894 Act cannot apply, as it is limited to offences punishable by fines not exceeding £100, and there is no provision incorporating it with section 357 of the same Act, so it would appear as if summary proceedings were inapplicable to this case. The only omission we have noticed in this carefully edited book is the absence of reference to *R. v. Hinde* under section 684 of the Act of 1895.

**Second Edition.** *The Law of Mortgage.* By W. F. BEDDOES. London: Stevens & Sons. 1908.

Mr. Beddoes calls this work "a concise treatise on the Law of Mortgage," and the term is quite justified. We were a little anxious before we examined it to discover how he had been able to get his subject into so compact a form when we thought of the size of Fisher. We find this has been done by eliminating the part of the subject associated with the Companies Acts and the Bills of Sale Acts, and of course by a concise treatment of the remainder of the subject. Mr. Beddoes in the Preface to the present edition calls attention to what he considers the two principal difficulties of this law. These are what may be called the question of priorities, and the Statute of Limitations as between mortgagor and mortgagee. Neither of these subjects is easy, and they well deserve the attention the Author has paid to them. In many points the law seems unsettled, and the learned Author can only offer us submissions. An important and necessary addition is the chapter on the Land Transfer Acts, the Act of 1897 having been passed since the issue of the first edition in 1893. A very good feature that we have noticed is the giving of the date of each case with the reference to it in the body of the work. In the Preface to the first edition it was stated that "the date of each decision is given in the Table of Cases," so we suppose the present system is an alteration.



**Third Edition.** *Sohm's Institutes of Roman Law.* By J. C. LEDLIE, B.C.L., M.A., with an Introduction by ERWIN GRUEBER, Dr. Jur., M.A. Oxford: The Clarendon Press. 1907.

The fact that Professor Sohms book, in the original German, has gone through twelve editions, clearly demonstrates the reputation of the learned Author. In England its merits have also been widely recognised. English law is based, to a large extent, upon Roman law, a fact which was, until comparatively recently, hardly recognised in the education of our lawyers. Now-a-days the importance of this branch of study is becoming more apparent. There will therefore be an increasing circle of readers of this treatise, the excellence of which must impress itself upon the most ordinary intellect. In arrangement it reminds us of the Institutes of Holland, the work of that great Roman-Dutch jurist, Van der Linden. The first part treats of the history of Roman law: Part II deals with the system of Roman Private law. In Part II we find another sub-division into Books 1, 2 and 3. The Law of Persons, the Law of Property and Family Law, and the Law of Inheritance, each have a book allocated to them respectively. The footnotes by Mr. Ledlie disclose a scholarly research and grasp of the various subjects dealt with. The translation is an accurate one, and it has the additional advantage of having been approved of by Professor Grueber of Munich, late Deputy Regius Professor of Civil law, and Reader in Roman law at Oxford. This gentleman also provides an Introduction which very clearly points out the difficulty the English tongue has in grasping the details of the Continental systems. This originates from the fact that the English law, although based on Roman law, has departed more widely from its principles than the Continental laws have. Whether this fact is in favour of the English system or *vice versa* is a matter which need not be discussed here. If one criticism might be offered, it would be in stating that there exists in the compilation of the Index considerable room for improvement. No doubt an Index should be condensed as far as possible, but the one under consideration has been abbreviated to an extent creating irritation. In conclusion, one is bound to say that every student who wishes to acquire a good working knowledge of Roman Private law could hardly do better than study the treatise written by Professor Sohms on that subject.

**Third Edition.** *Law and Custom of the Constitution* Vol. II: The Crown, Part I. By Sir WILLIAM R. ANSON, Bart., D.C.L. Oxford: The Clarendon Press. 1907.

This book only contains the first four chapters of the second volume of Sir William Anson's work. These are respectively on Prerogative of the Crown, The Councils of the Crown, The Departments of Government and the Ministers of the Crown, and The Title to the Crown and the relation of Sovereign and Subject. The historical sketch given of the origin and development of each of these subjects is in the highest degree valuable, particularly that on the Councils of the Crown. The history of the changes in the natures and powers of the Royal Councils, their sub-division and ultimate solidification in our present Constitution, is one of great complexity and difficulty, and is treated by Sir William Anson with his well-known lucidity and learning. The history of Cabinets has been more particularly examined from their first inception in the reign of Charles II, and much attention paid to their relations to the Council itself and the Committees of the Council. It is impossible to over-estimate the improvement in Parliamentary government that ensued when there was at last established, not only individual responsibility of one Minister for his own acts, but also the collective responsibility of the Ministers for each other's acts. It is remarkable how late it was in the history of our Constitution before anything like the position of a Prime Minister was established. Walpole seems to have been the first who practically acted as such, and it is curious that it was the ignorance of the two first Georges of the English language, and their consequent absence from the meetings of the Cabinet, which produced the two-fold effect, that "the King lost initiative and control in discussing and settling the policy of the country," and the Prime Minister became a more definite person than heretofore. It is difficult to understand how the state of affairs caused by the existence of both *efficient* and *non-efficient* members of a Cabinet was allowed to exist; when "statesmen who had once been Cabinet Councillors considered themselves to remain within the outer circle of the Cabinet, even though their political opponents held the great offices of State," and to realise that Lord Loughborough asserted this right as lately as 1801. It is interesting to note that though the term "Prime Minister" is unknown to the law, and does not occur in any Act of Parliament, it has yet found its way into two formal documents. The first is the Treaty of Berlin,

and the second is the Warrant by which the present King gave the Prime Minister precedence. Here we wish to express our hearty gratitude to Sir William Anson for never once, as far as we have been able to observe, having used the odious term "Premier." It may be news, even to many lawyers, that it would be quite legal, though neither just nor politic, for an incoming Minister to apply the "Spoils System" and to obtain the dismissal of that large proportion of civil servants who hold office during pleasure. To our mind the most interesting, and perhaps the most important part of the work, is where Sir William, a Member of Parliament, who has held office under the Crown, points out the very important changes which have recently, in his opinion, taken place in the relations to each other of the Prime Minister, the Cabinet, the House of Commons, and the Constituencies. He compares Bagehot's view of the characteristics of the House of Commons when Palmerston was Prime Minister with those of the present one. This alteration may shortly be described as a change in the position of Members. "A Member is no longer sent to Parliament because it is thought that he can form a better opinion on the topics of the day than the voter who sent him there. He is sent to vote for the Minister, and for the measures acceptable to the Party organisation, by whose exertions he has been returned." Another change is a loss of control over the selection of Ministers, and last, and perhaps most important, the disappearance of "government by discussion." This last has been strikingly exemplified this last Session, though Sir William does not specifically refer to it, when an important measure containing provisions absolutely unexampled, was forced through the House of Commons by means of the "guillotine" with 13 out of its 15 clauses undiscussed. We think we might add to the learned Author's criticisms, that the House has ceased to be "a deliberative assembly." For the causes of these changes, and how they are partly due to, and in their turn act on, the increased power of the Prime Minister and the Cabinet, we must refer our readers to Sir William Anson's Introduction, and assure them they will find there both profit and pleasure. Unfortunately, *Queen Victoria's Letters* appeared too late to enable Sir William Anson to make use of them in the body of his work, but he refers to them for the purpose of illustration in his Introduction.

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**Third Edition.** *The Law and Practice relating to the Formation of Companies.* By VALE NICOLAS and W. F. LAWRENCE, M.A. London: Butterworth & Co. 1908.

Although the first edition of this book was only issued in 1903, it has been found necessary to issue a second in 1904, and the present edition in 1908. The Authors have striven to supply an omission, that has existed up to the present time, of compiling a treatise which deals exclusively with the formation of Joint Stock Companies. It is a curious fact that, although the term occurs both in the Companies Act of 1900 and in the Act of 1907, it is nowhere defined as to what is meant by "the Public." Various cases have dealt indirectly with this point, but in not one of them is it specifically decided. Since the issue of the second edition many important things have happened. Table A has been revised and re-issued; the rules of the London Stock Exchange dealing with Special Settlements and Official Quotations have been considerably altered; new cases on the formation of Limited Liability Companies have been decided. Last but not least, the new Companies Act of 1907 has been passed. All of these matters have been dealt with and have been incorporated into the text. Permission has been given by the Committee of the London Stock Exchange to print in the book the new rules, and special information has been given respecting Special Settlements and Official Quotations. Not only in the List of Cases, but also in the text, the date when each case was decided, is given. The forms given at the end of the book, numbering 173 in all, are most comprehensive, and include some very excellent model Articles of Association. If we were to venture upon any criticism, it would be that the "Index to Treatise and Notes" errs on the side of terseness. The treatise is, however, a very excellent one, and does great credit to the erudition of the learned Authors. No doubt the present edition will continue to be as successful as the former ones, and will continue to appeal to a wide reading public as it has done in the past.

**Fourth Edition.** *The Law of Libel and Slander.* By HUGH FRASER, M.A., LL.D. London: Butterworth & Co. 1908.

Mr. Hugh Fraser's name, as an authority on the Law of Libel and Slander, has become of late years particularly well known in the legal world. Associated with a large majority of leading cases in this branch of law, he can speak with the weight of practical as well

as theoretical knowledge. The result of this practical experience is incorporated in Appendix A, which treats on the conduct of a Civil Action. Two matters upon which the learned Author lays great stress will most certainly commend themselves to the prudent practitioner:—(1) It is always wise not to issue a writ for libel or slander in a hurry; (2) In actions for slander, where so much depends upon the exact words spoken, get signed proofs from the witnesses as soon as possible. How often does the angry client insist on a writ being served without a moment's delay, and how often have lawyer and client lived to regret the day this was done, without a careful survey of the situation. Many and many a case has been lost by counsel, relying upon a glowing proof, being hopelessly "let down" by the witness when in the box. Recent decisions in the Court of Appeal dealing with fair comment, have necessitated the re-writing of the division of the text which deals with that subject. Later and riper experience has enabled Mr. Fraser to add many valuable hints to those formerly given in Appendix A. Fresh forms have been added to those which hitherto appeared in Appendix B, and include precedents of Pleadings, Particulars, Applications, Interrogatories, etc., which will prove most useful to any practitioner. Another useful innovation appears in the Table of Cases. The page upon which the facts of any particular case appear, is numbered in heavy type, thus preventing the reader from hunting up several references before he obtains this information. The same plan has been adopted in the Index to Statutes. The references to the pages in the Appendix where the Statutes are set out in full are also printed in heavy type. It will thus be seen that no pains have been spared to make this treatise complete, handy, and up-to-date. The text is written in simple and uninvolved language, the several points are made clearly and concisely. The book will therefore be useful alike to law student, practitioner and layman, thereby creating an enormous reading public. The size of the volume is such as to be easily carried about for ready reference. In conclusion, it is only necessary to add that the Index is complete, and offers a sure guide to the contents of the text.

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**Fourth Edition.** *Law and Practice in Divorce.* By W. J. Dixon, LL.M. London: Butterworth & Co. 1908.

The law of Divorce is not a very wide subject, but Divorce practice is. This fact is demonstrated when we see that, in a standard

work such as Mr. Dixon's is, Divorce law takes up seventy-five pages, whereas Practice takes up some two hundred and twenty pages. Probably this is due to questions of Divorce resolving themselves mainly into questions of evidence. Such vexed questions, as to what is domicile, adultery, cruelty, impotence, etc., must obviously be decided upon the facts of each individual case. When one realises the difficulty and expense of procuring a divorce prior to 1857, it is hard to comprehend why our forefathers tolerated this state of things for so long. The Matrimonial Causes Act of that year revolutionised matters, and increased facilities have produced an increased demand for Divorce, as is proved by the large number of cases dealt with each year by the Divorce Court. To those whose work lies in that direction, Mr. Dixon's treatise is of the greatest practical utility. Instructive, clearly written, and well-informed, it gives every aid requisite. As the learned Author says himself, whatever information cannot be traced by the Index, will probably be found in the comprehensive summary of the contents of the several chapters printed at the commencement of the book.

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**Seventh Edition.** *The Law of Wills.* By H. S. THEOBALD, K.C. London: Stevens & Sons. 1908.

*The Law of Wills.* By A. GUEST MATHEWS, M.A. London: Stevens & Haynes. 1908.

Mr. Theobald has made the intricate subject of the Law of Wills peculiarly his own, and he would be a bold man who ventured to disagree with any opinion stated by the learned Author. It is now three years since the sixth edition issued from the Press. Since then many decisions, some comprehensible, some incomprehensible, have been given by the Courts. The House of Lords has shown a laudable desire to sweep away old canons of construction which sought to give ordinary words other than their usual meaning. A touch of humour was introduced by the same Court in their decision of *Grimond v. Grimond*, where they held that religious institutions were not necessarily charitable. But for genuine humour one must go to the Emerald Isle. The instance given by Mr. Theobald, in the Preface, of the case where a testator was cross-examined by the Court as to the meaning of a bequest known to appear in his Will, is Gilbertian in its irony, but is too long to be given here. The learned Author has added a chapter on the "Devolution of Trusts

and Powers," in which is collected information on that subject which had been scattered under various heads in former editions. The *List of Cases* takes up one hundred and forty pages, a slight indication of the mass of work necessary to compile such a treatise, and incidentally showing the amount of litigation involved in seeking to construe the often vaguely expressed wishes of persons making Wills. The work is headed "A Concise Treatise on Wills," and occupies some eight hundred and seventy-four pages! Was this sarcasm on this branch of the law intentional or involuntary on the part of the learned Author? The Index is a model to other writers of how to furnish the reader with an easily understood key to the text. Generally speaking, Mr. Theobald is to be congratulated upon producing a book which will probably long continue to remain the standard work on the subject treated of.

Mr. Guest Mathews states that his little book is primarily intended for students, and seeks to elucidate for their information the fundamental principles which underlie the law relating to Wills. Regarded from that standpoint, it may safely be commended to the use of those beginning their legal studies. Standard works very often start from a point which has not been reached by the student, and the present work will be useful in guiding their footsteps along the path which leads to that point.

**Eighth Edition.** *The Law of Torts.* By Sir F. POLLOCK, Bart., D.C.L. London: Stevens & Sons. 1908.

It is always a pleasure to examine a fresh edition of one of Sir F. Pollock's masterly treatises, and to refresh one's memory of his scholarly dissertations on the branches of law which he has made his own. The rapidity, however, with which fresh editions are called for, generally prevents the reviewer from having much new material to comment on. In the present instance there are not many decisions of importance since the last issue to be noticed, but one statute of great importance has been passed, namely, the Trade Disputes Act 1906; and we think it will interest our readers to hear the opinion of the distinguished jurist on this piece of legislation:—"The Legislature has thought fit, by the Trade Disputes Act 1906, to confer extraordinary immunities on combinations, both of employers and of workmen, and to some extent on persons acting in their interests. Legal science has evidently nothing to do with

this violent empirical operation on the body politic, and we can only look to jurisdictions beyond seas for the further judicial consideration of the problems which our Courts were endeavouring (it is submitted not without a reasonable measure of success) to work out on principles of legal justice." And again, "It is not within a text-writer's province to comment on the policy of the statute or the reasons unconnected with the science of law which led to its enactment without serious opposition in either House of Parliament." We think it worth while to call attention to a few of the learned Author's opinions on doubtful and undecided questions of law. He supports the contention that in modern law the person who intentionally does harm to another is *prima facie* liable, in spite of the opinion to the contrary of Mr. A. Cohen, K.C., in his memorandum on *Allen v. Flood*. He also differs from Mr. Beven in considering that under an ordinary rule of due care and caution "mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated," cannot be taken into account. He submits "that whether *Clark v. Chambers* can stand with it or not, both principle and the current of authority concur to maintain the law as declared in *Sharp v. Powell*." He disapproves of the decision of the Judicial Committee in *Victorian Railway Commissioners v. Coultas*; and strongly criticises the "barbarous rule" *actio personalis moritur cum persona*. We notice the pleasant observation that "there are incidents, again, in every football match which an uninstructed observer might easily take for a confused fight of savages." A valuable opinion on a much-disputed question is that on Martial law: "I venture to think it is the better opinion that whatever, in time of war within the jurisdiction, is or reasonably appears necessary for the common defence against the King's enemies, is justified by the Common law, but that, in the absence of an Act of Indemnity, the existence of the necessity and the reasonableness of the action are to be determined by the ordinary Courts when peace is restored." He takes the view, on which there is at any rate an apparent conflict of authorities, that inevitable accident is not a ground of liability. It must be a subject of just gratification to the learned Author to be able to point out that something like four pages of the text under the heading "Seduction" have been adopted by FitzGibbon, I.J., in his judgment in *Murray v. Fitzgerald*. Some interesting new points suggested by the progress of modern science are glanced at, such as, "whether defamatory matter recorded on a phonograph would be a



libel or only a potential slander ;" and whether it is a trespass to pass over land in a balloon or air-ship. It is difficult to say why it should not, and that would seem to be Sir Frederick's opinion, although he suggests that the most reasonable rule might be "that the scope of possible trespass is limited by that of effective possession." It may interest many owners of animals to know that "whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as is the case with an ox, is a point still not clearly decided. The better opinion seems to favour a negative answer as to dogs and also fowls." We can only further call attention to the careful examination of the different views in England and the United States, as to the position of the receiver of an erroneous telegram, and the learned Author's opinion that the American decisions are on principle correct.

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**Eighth Edition.** *Shirley's Leading Cases in the Common Law.* By R. WATSON, LL.B. London : Stevens & Sons. 1908.

This, which was originally a book intended solely for students, has been adapted by the present Editor to the use of practitioners ; or rather, to quote his own words, his endeavour was "to increase the utility of the work as a book of reference for practitioners without rendering it less acceptable to the law student." The 148 cases range over a great variety of subjects, and include such a recent decision as *Colls v. Home and Colonial Stores*, which makes its first appearance as one of these leading cases. The earliest case we have noticed is *Lampleigh v. Brathwait*, decided in 1616. We have looked at a good many of these cases and found the notes very good. The statements are concise and clear, and the cases cited well-selected. We are a little doubtful as to the use of continuing to give *Wells v. Abrahams*. The present law on the subject seems quite uncertain, and Lord Halsbury did not do much to settle it in the *dictum* quoted from *Vernon v. Watson*. The work contains a very large amount of useful law, conveniently arranged and clearly and pleasantly presented.

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**Fifteenth Edition.** *Snell's Principles of Equity.* By ARCHIBALD BROWN, M.A., B.C.L. London : Stevens & Haynes. 1908.

This is, we believe, the best-known work on the principles of Equity, and may fairly be considered as the standard book on the subject. We have never inspected the first edition, so do not know

whether it was originally intended only for the use of students; but the title-page now states that it is "intended for the use of students—and of practitioners." There is no doubt that, under the careful editorship of Mr. Brown, who has now been responsible for twelve of the editions, it has thoroughly carried out that intention. As the last edition was issued as lately as 1904, we cannot expect a great amount of new matter, and the Editor wisely only adds such cases as are indispensable. Some new statutes of considerable importance have been summarised or referred to, among which we may mention the Public Trustee Act 1907, the Limited Partnerships Act 1907, and the Companies Act 1907. We notice that it would now appear, by the very recent case of *Wedmore v. Wedmore*, that the opinion, that a legacy given to a creditor in satisfaction of his debt was entitled to priority, is doubtful. The most important new feature is one which we heartily welcome, and one which we shall be glad to notice in some other new editions—an attempt at simplification "by the division of the text throughout into much shorter paragraphs; and this division has proceeded on the principle of making each paragraph complete in itself and of confining each paragraph (so far as it was possible to do so) to one single subject-matter."

**Eighteenth Edition.** *Woodfall's Law of Landlord and Tenant.* By the late J. M. LELY and W. H. AGGS, M.A., LL.M. London: Sweet & Maxwell. 1908.

It is with regret that we have again to refer to the death of Mr. J. M. Lely, whose name is associated with this and many other important law works. He had edited *Woodfall* ever since 1877, and brought out the eleventh to seventeenth editions inclusive, and had done much by his industry and learning to sustain the high position of authority which this work has so long maintained. We miss also his characteristic introductions and his suggestions for the amendment of the law, which if not always practicable were at any rate worthy of consideration. Mr. Aggs has taken up the work and seen the present edition through the press. He calls attention to the increasing tendency to put a limitation to freedom of contract, as exemplified by the compulsory sharing of extraordinary expenses incurred under the Factory and Workshop Act 1901, and the Agricultural Holdings Act 1906. We are unable to agree with Mr. Aggs' statement in his Introduction, that this last Act has been "very fully dealt with." There is a short summary of it, and a few

other references to it, but no serious attempt has been made to point out or discuss the many difficult points which will probably arise. The revision has not been complete, as curiously enough we notice the same inaccurate wording of the 128th section of the Public Health Act 1875 that was pointed out in these pages in the notice of the last edition. Possibly the late learned Editor did not read the *Law Magazine and Review*, although he was a frequent and valued contributor to its pages. The decision in *Jones v. Lavington* has compelled the Editors to reconsider the opinion expressed in the last edition, which was that the decision of the High Court in *Budd-Scott v. Daniel* was to be preferred to that of the Court of Appeal in *Baynes v. Lloyd*; but now, "until the view of the Court of Appeal in *Baynes v. Lloyd* is reconsidered and either dissented from or confirmed, it is conceived that the law is as it was laid down in *Baynes v. Lloyd* and *Jones v. Lavington*, and it is submitted also that *Budd-Scott v. Daniel*, which was referred to in argument but not dealt with in the judgment delivered in *Jones v. Lavington*, can no longer be considered as good law." The cases on the incidence of rates under Public Health and Metropolis Management Acts are as difficult and irreconcilable as ever. It may be interesting to note that the late Mr. Justice Kekewich, in *Porter v. Gibbons and Bissett*, decided that the reception of paying guests was no breach of a covenant not to sub-let without licence but to use the house as a private dwelling-house. In the present edition the lengthy extracts from the Agricultural Chambers Reports on "Unexhausted Improvements" are omitted, on the ground that it is almost impossible to usefully set out the varying customs in the different localities. There is no allusion when discussing Water Rates to the Metropolitan Water Board (Charges) Act 1907.

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**Nineteenth Edition.** *Paterson's Licensing Acts.* By W. W. MACKENZIE, M.A. London: Butterworth & Co. 1908.

The eighteenth edition of this standard work appeared as recently as January 1907, but the favourable reception accorded to it has necessitated a fresh edition. This fact must be very gratifying to the learned Editor, and is a strong proof of the value attached to this treatise by all interested in questions of Licensing. Not very much of great interest has happened in the intervening period, yet litigation by parties seeking to unravel the intricacies of the Licensing law is unabated. Two cases of import are, however, worthy of notice.

The House of Lords, in *Leeds Corporation v. Ryder*, defined the position of Licensing Justices, acting as the renewal authority under the Licensing Act 1904. In *Liverpool Corporation v. Walker*, the Divisional Court enunciated some principles of great practical utility when deciding the distribution of the compensation money among those who are affected as being interested in the premises the subject-matter of compensation. The latter decision, however, is being appealed against, and it will be interesting to observe whether the judgment of the Divisional Court will be upheld. A mass of interesting information concerning the Trade, culled from Blue Books and other sources, is given in the Preface. The diminution of licenses will be viewed with satisfaction by the Temperance Reformer, and with regret by Members of the Trade. "One man's meat is another man's poison!" It is interesting to note that the Beacontree Division of Essex prohibits the employment of barmaids as a condition attached to the new grants for the purpose of securing the monopoly value. Mr. C. G. Moran has prepared the General Index which bears the stamp of great capacity. Mr. F. H. Coryton Day has compiled the Tables of Contents, Statutes and Cases, with commendable skill. Speaking generally, one may say, that the present edition is quite equal to former ones, and is worthy of the high reputation of the learned gentleman who has edited this work since the tenth edition.

**Twenty-eighth Edition.** *Handbook on Joint Stock Companies.* By F. GORE-BROWNE, K.C., and WILLIAM JORDAN. London: Jordan & Sons. 1908.

If proof were required of the practical utility of this work, it would be afforded by reading the history of its twenty-eight editions which appears on page 621. The first edition was issued in 1866, several editions have been reprinted, and one has been translated into French by MM. Giraudet and Méliot. Since 1891, when the fourteenth edition appeared, the present Authors have been associated in producing this treatise. One may well ask from what source springs this ever-growing popularity, and the answer is very easy to find. First and foremost the book is absolutely up to date, an essential in works on Company law. For lucidity of style, completeness of reference, and in fact for everything which goes towards making a useful Handbook, it would be hard to match, and certainly could

not be surpassed. The issue of a new edition has been necessitated by the passing of The Companies Act, 1907 (7 Edw. VII, Ch. 50). This new Act does not come into force until July 1st 1908, but a review of its sections is necessary in order to enable the lawyer to master the many novelties which will come into being when the Act is operative. Among the many important changes effected the following may be specified. For the first time Private Companies will be definitely recognised; this is intended to supply a deficiency existing in the Act of 1900. A provision that Foreign Companies, which *mirabile dictu*, includes Colonial Companies, shall register—(a) particulars of their constitution, (b) a yearly statement of affairs or balance sheet, (c) the names of their directors, (d) the name or names of a person or persons to accept service of process on their behalf. Power of control is given also to creditors of companies over the appointment of the Liquidator, in the case of voluntary winding up, and provisions enabling the dissolution of a company wound up voluntarily to be set aside. These and many other novel details of equal or minor importance, introduced by the new Act, show the amount of legal knowledge and experience of the routine working of a company which must be brought to bear on this subject. The names of the two Authors are sufficient guarantee of the existence of these two requisites, and the result is proof of their application to the task. As before, Mr. Gore-Browne is responsible for the legal portions of the book, and Mr. Jordan for the details relating to the current practice of the Registrar of Joint Stock Companies and the Commissioners of Inland Revenue. As the law relating to Companies increases, there is always a danger of a work passing beyond the size of a Handbook. This has to some extent been obviated by increasing the size of the pages, but the printing, *in extenso*, the new Act of 1907 has increased the bulk by over 100 pages. Perhaps in future editions, when the new Act is more familiar, this will cease to be a necessity. The List of Cases and Index in the present edition are full and illuminating of the contents. In conclusion, it is sufficient to say, that the present edition is quite equal to the standard set by former ones, than which it would be hard to conceive any much higher.

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**Fortieth Edition.** *Stone's Justices' Manual for 1908.* By J. R. ROBERTS. London: Butterworth & Co.

**Eighth Edition.** *Wigram's Justice's Note-Book.* By LEONARD W. KERSHAW. London: Stevens & Sons. 1908.

The Legal World has come to look upon *Stone's Justices' Manual* very much as it has come to look upon the "White Book," that is to say, that the annual edition chronicles what has happened during the year. The labours of Mr. Roberts in preparing the present edition must have been tremendous. Of the fifty-six Statutes passed during the year 1907, no less than twenty-seven had to be dealt with in more or less detail as affecting the jurisdiction of Justices. To mention a few, such as the Probation of Offenders' Act, with its new rules, Butter and Margarine Act, Public Health Acts Amendment Act, and Lights on Vehicles Act. One hundred and twenty new cases had to be noted, Licensing law playing a very important part in their number. Such points as the Compensation Clauses of the 1904 Act and Rules, appealing on the question of the division of compensation money, and a decision under the Intoxicating Liquors (Sale to Children) Act. The Home Office has initiated a much needed reform, by reprinting Home Office Circulars to Justices and Justices' Clerks for a period of twenty-four years previous to October 16th 1907. The Editor again thanks correspondents for their useful suggestions, and it is undoubtedly largely due to these suggestions that the Manual is so comprehensive. The Editor has cause to review the result of his labours with considerable satisfaction, and the legal profession will doubtless show its appreciation by reading and using the latest edition.

The *Justice's Note-Book* does not seek to encourage comparison with such a standard treatise on Magisterial Law, as say the one above reviewed. Mr. Kershaw merely claims it to be a Note-Book and nothing more. As the late Mr. Knox Wigram, who prepared the first edition, stated, "Short and reliable information, available on the spot is, next to ready money, the most desirable thing in life." Most mistakes in life are caused by forgetting something which one ought to have remembered and remembers directly one is reminded. It is to fulfil that mission that the present work was first of all initiated. No master craftsman better qualified to carry on the duty could have been chosen than the present Author, whose knowledge of Criminal law is widely recognised in the legal profession.

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*Two Studies in International Law.* By COLEMAN PHILLIPSON, M.A. London: Stevens & Haynes. 1908.—In this unpretentious but very careful work Mr. Phillipson (who is Quain prizeman of

University College, London) deals in a lucid fashion with the two subjects of Arbitration and Telegraphic Communication in War. His treatment of the latter we regard as the more valuable part of the book. The Author collects authorities which are not readily to be found elsewhere, and the results of his research should be very useful to all who are attacking that obscure subject. The essay on Arbitration is a comprehensive introduction in short compass to the study of the peaceful settlement of disputes. Mr. Phillipson appears to have a wide acquaintance at first hand with the works of jurists who write in the less-known tongues; and it can safely be said that his own views are marked by balance and pronounced good sense. It should be added that the work of the last Hague Conference is taken into account. Sir J. Macdonell is to be congratulated on the interest which his Quain lectures inspire in his auditory.

*Criminal Appeal and Evidence.* By N. W. SIBLEY, LL.M. London: Sweet & Maxwell. 1908.—This is an interesting work, containing as it does a great deal more than the Criminal Appeal Act 1907 and notes thereon. It begins with an essay in which is discussed the history of the movement for Criminal Appeal, the various arguments used for and against, and finally the Act itself, its merits and possible defects. It is rather remarkable if it should be, as contended by Mr. Sibley, that the abolition of the writ of error has deprived a defendant of the right of having reviewed a judgment given against him on a general demurrer to an indictment, but no doubt the same points can be taken after conviction. Mr. Sibley says: "It is implicit"—this is rather a favourite word of his, the use of which is rather peculiar—"that conferring a right of appeal in a criminal case implies the liability to reverse the verdict of acquittal." This is a little misleading, as the only power of the Crown to appeal is a qualified one on a point of law from the decision of the Court of Criminal Appeal in the defendant's favour, if that can strictly be called an acquittal.

We do not understand the contention that the provision in the Criminal Appeal Act abolishing the granting of new trials in criminal cases, has implicitly abolished the possibility of removing indictments for felony by *certiorari*. An order for the change of venue is not an order for a new trial, but a direction where the trial is to take place. As might be expected, there are numerous references to

the Beck and Edalji cases. A considerable amount of attention is devoted to several other "remarkable cases of circumstantial evidence," among others those of William Habron and Gardiner. There is a useful dissertation on restitution; apparently the Court of Criminal Appeal will have no original jurisdiction in this matter. There are also chapters on "the prerogative of mercy," and "compensation." We are sorry to find the Index is rather deficient; for instance, there are no headings of "restitution" or "new trial," and the one of "Omission to raise objection to a question by counsel during cross-examination does not prove the question is admissible,"—does not seem valuable.

*The Weights and Measures Acts 1878—1904.* By W. E. BOUSFIELD. London: Stevens & Sons. 1907.—Mr. W. R. Bousfield, K.C., contributes a short Introduction to this treatise, giving the history of the Act of 1904. This was an Act of considerable importance, as its object was "to introduce uniformity where before there had been diversity of practice," and it was followed by the Board of Trade Regulations made under that Act. Mr. Bousfield, in a short Introduction, describes the law of Weights and Measures and the changes introduced by the Board of Trade Regulations. He then gives the successive Weights and Measures Acts of 1878, 1889, 1892, 1893, 1897, 1904, with notes and references to the sections when required. Then we find the Weights and Measures Regulations 1907, made by the Board of Trade, containing 139 sections and accompanied with elaborate tables and a schedule of Instructions to Inspectors. The whole contains a mass of detail which is very important for the trade of the country, but not interesting reading. A number of other Acts which are affected by the Act of 1904 and the Regulations of 1907 are given in whole or part, such as the Bread Acts, Coal Mine Regulation Act, Market and Workshop Acts, &c. The whole of this dry subject has been carefully and laboriously examined and set out by Mr. Bousfield, and to him are due the thanks of all those concerned in the administration of these Acts.

*The Acts relating to the Estate Duty.* By J. WEBSTER-BROWN. London: Horace Cox. 1908.—Mr. Webster-Brown truly says of the Finance Act 1894 that "the Act and its amending Acts together form one of the most complex and intricate branches of the law, as His Majesty's judges have admitted on more than one occasion."



This, however, is rather a mild way of putting the opinions of some of his Majesty's judges. One of the most eminent of them said that the provisions of this Act were "strangely confused and singularly ill-drawn." Mr. Webster-Brown, however, says "it has fairly well effected the object of its framers." This tempts us to quote another passage from the same judgment as to the manner in which in the particular case in question the attempt had been made to construe the Act. The Author has the great advantage of having had long official experience in connection with these Acts, but he carefully and most properly states that his book is not an official publication, and that his office is in no way bound by it. The subject seems to us to be very thoroughly and clearly treated. A particularly good feature is the unusually full statements of the facts of many of the cases cited; a very great assistance to anyone searching for authorities. We think the work will be most useful to all those who have to consider the law and defend their clients against the claims of an insatiable Treasury.

**Second Edition.** *The Agricultural Holdings Act 1906.* By G. A. JOHNSTON. London: Effingham Wilson. 1908.—Mr. Johnston cannot repeat too emphatically his warnings to landlords and their representatives to look carefully into their positions under this Act and make arrangements accordingly. He probably, justly, disclaims any bias in favour of landlords, but he cannot as a lawyer consider the Act without perceiving and calling attention to the fact that its provisions are intended to be all in favour of tenants. Mr. Johnston points out clearly the difficulties and disadvantages which landlords may come under in consequence of this Act, and by forewarning thus endeavours to forearm them. Some of his suggestions are very ingenious, but we are doubtful—as in fact he himself seems to be—whether they will all hold water: but those regarding more elaborate covenants of repair and provisions against deterioration, seem to us thoroughly practicable. We can recommend the book to the perusal of all interested in estates.

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**Second Edition.** *Legal Representatives.* By S. E. WILLIAMS. London: Stevens & Sons. 1908.—"Legal Representatives" is the modern name for executors and administrators, and Mr. Williams' object is to give the law relating to these in the smallest possible

compass. The learned Author admits that the task he undertook is not an easy one, and that it has required "severe and laborious compression." He gives as an instance the difficulty of dealing with the Death Duties in half-a-dozen pages. He has adopted one way of making more concise the statements in that chapter, and as far as we have noticed in that chapter alone, by omitting the names of the cases and only giving the reference to the report. It is not in our opinion at all a good plan. The chapter on Real Estate, to which attention is especially called in the Preface, is intended to bring out the changes introduced by the Land Transfer Act 1897. The book seems clear and useful, though we are not quite sure we should go so far as does the Author who considers that "the work, though so short, is sufficiently full and comprehensive to meet the ordinary requirements of the practitioner."

**Forty-fifth Edition.** *Every Man's Own Lawyer.* By a Barrister. London: Crosby Lockwood & Son. 1908.—This book gives information on twenty-two subjects, each of which has furnished material for whole shelves full of treatises. No doubt it would be easy to indulge in cheap witticisms when reviewing a work of this nature, but unquestionably there is a large section of the public which likes its law in tabloid form. "Six-and-eightpence saved at every consultation" is the proud boast printed in gilt letters on the cover. Yes, but how many guineas eventually paid in costs might have been saved if a few of these initial consultations had been paid for? Such a discussion might be as *caviare* to the moralist and philosopher, but would be out of place in a review. The work itself shows signs of great care, both in preparation of the text and in the effort to keep it quite up-to-date. During the year 1907 many controversial Acts were passed, and these are noticed. Acts such as the Deceased Wife's Sister's Marriage Act produced much controversy at the time as affecting a large section of the community, and in the latter aspect is dealt with in the book under review. The Dictionary of Legal Terms will prove of considerable assistance to the layman. The Index is an efficient guide to the contents.

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## CONTEMPORARY FOREIGN LITERATURE.

*Römisches Privatrecht bis auf die Zeit Diokletians.* Vol. I. Juristic Persons. By LUDWIG MITTEIS. Leipsic: 1908.

The characteristics distinguishing this from other works of the same kind is citation of the papyri—the compilations of Drs. Grenfell and Hunt being frequently used as confirmatory evidence of the texts—and an examination of *Rechtsnationalität*, the beginnings of International law. The work is carried out with true German completeness. This is especially noticeable in the chapter on Corporations.

*Nuovi Appunti intorno agli Effetti della Sentenza sulla Prescrizione dei Crediti.* By Prof. M. RICCA-BARBERIS. Milan: 1908.

A commentary on the decision of the Court of Cassation at Rome in a case of *Griff v. Muri* in 1906. The decision was to the effect that the operation of a judgment in a commercial action does not extend beyond thirty years, whatever may have been by agreement of the parties the prescription of the original action. It appears that in certain cases the parties may settle their own prescription. But after judgment *il diritto astratto di agire* is fixed by law.

## PERIODICALS.

*Journal du Droit International Privé.* Nos. I, II. Paris: 1908. —At pp. 103 and 109 will be found interesting articles on the position of foreign companies in England, and on payment of death duties by foreigners. But no cases are cited, and the statutes on which the law depends can hardly be understood without the concrete application. Some interesting cases will be found later in the volume. The Tribunal of Tunis, in *Attias v. Agoulai*, in 1907, held that the duty of a deceased husband's brother to marry the widow where all are Jews (the levirate), does not attach where the widow was before her marriage an Italian Christian (p. 143). With recent Privy Council decisions compare a case on p. 145, where the Court of Cassation at Paris held that there is no appeal from a court martial (*conseil de guerre*) sitting in Crete. At page 194 the Algiers baccarat case, *Moulis v. Owen*, is called by the French

reporter système bizarre et captieux. At p. 237 is noted *The People v. Marcus* (1906), where the Supreme Court of New York held that art. 171 of the New York Penal Code was unconstitutional. That article enacted that every employer who made it a condition that an employé should not be a member of a labour union should be liable to fine and imprisonment.

*Deutsche Juristen-Zeitung.* 1 Jan.—15 March. Berlin: 1908.—*Wozu studieren wir noch das römische Recht?* asks Dr. Sohm at p. 33. Because, answers he, without it we can only study a national system of law as a trade, not as an art. One notices that *Anson on Contract* has been translated by Dr. W. Prochownik, with a glossary of English terminology. The usually carefully compiled *Spruchsammlung*, or digest of criminal and military law for 1907, accompanies the number of 1 March.

*Giustizia Penale.* 2 Jan.—12 March. Rome: 1908.—There are comparatively few decisions of interest to English lawyers. Application for special leave for a ball in an hotel must be made by the promoters, not by the hotel keeper (p. 89). It would be the latter in England. Stealing gas before it goes through the meter is *contrectatio rei alienae* (p. 91). At p. 98 is another of the frequent decisions on the law as to exportation of objects of art and antiquities. It was held to be an offence to sell four pictures even though the purchaser returned them to their original place at Milan. Smuggling is a continuing offence, and the goods may be seized anywhere on the train, even though they may have evaded the notice of the customs officials at the frontier (p. 174). In forgery *imitatio veri* is unnecessary. The signature need not be an attempt to imitate the handwriting of the person whose name is forged (p. 311).

JAMES WILLIAMS.

## WORK OF REFERENCE.

*Debrett's House of Commons and the Judicial Bench 1908.* London: Dean & Son.—We have received the new edition of this handy work of reference, and find it in every way up to the high standard of previous ones. In both sections the book has been brought right up to date, and all changes from the

time of the General Election of 1906 down to the date of publication are listed in a form handy for reference. In the "Judicial Bench" portion of the work, which includes biographical notices of the Judges of the Superior and County Courts, Recorders, Metropolitan and Stipendiary Magistrates, Colonial Judges, etc., many important alterations and additions have been duly noted. We frequently have occasion to refer to this useful work, and have always found the information given reliable and complete.

Books received, reviews of which have been held over owing to pressure on space:—*Robbins and Maw's Devolution of Real Estate*; *Encyclopædia of Local Government Law*; *Freeman's Patents and Designs Act 1907*; *The Annual Statutes 1907*; *Mew's Annual Digest 1907*; *Smith's F. W. Maitland*; *Encyclopædia of Forms and Precedents*, Vol. 14; *English Reports*; *Hill's Yearly Digest*; *Encyclopædia of the Law of England*; *Ringwood's Bankruptcy*; *Barham's Students' Text-book of Roman Law*; *Strahan's Law of Wills*; *Simonson's The Companies Acts 1900-1907*; *Gale on Easements*; *Swan's Patents, Designs and Trade Marks*; *Williams' Bankruptcy Practice*; *Roscoe's Criminal Evidence*; *Short and Mellor's Practice of the Crown Office*; *Cornish's District Councils*; *Gordon's Statute Law relating to Patents*; *Hemmant's Law of Limited Partnerships*; *Lacassagne's Peine de Mort*; *Jackson's Justinian's Digest, Book 20*; *Shaw's Manual of Vaccination Law*; *Mosley and Whiteley's Law Dictionary*; *Workmen's Compensation Cases*, Vol. 9; *Garrett's Law of Nuisances*; *Cohen's Criminal Appeal Act 1907*; *Smith's Principles of Equity*; *Piggott's Exterritoriality*; *Robinson's Law relating to Income Tax*.

Other publications received:—*Mauro's Man's Day* (Morgan & Scott); *New Regulations of the French Law (January 1907) affecting English Companies in France* (Stevens & Sons); *Aggs' The Small Holdings and Allotments Act 1907*; *Rubinstein's Land Registry Bill*; *The Bibliophile*, Nos. 1 & 2; *Pegram's Land Title Registration* (N. Y. State Bar Assn.); *Reports of the American Bar Association*, Vol. 31; *The New Zealand Law List*.

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer (India)*, *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

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## I.—THE HISTORY OF THE CRIMINAL LAW.

THE judicious reader will at once assume that I do not propose to sketch the history of the Criminal law within the compass of a magazine article. The task which I have undertaken is more reasonable, and promises greater interest and profit. I intend to ascend for a little into the region of historical jurisprudence, and to discuss the history of the principles of punishment, as these are set forth in one of Lord Kames' *Historical Law Tracts*, which bears the title of this paper. This Law Tract is peculiarly adapted to such discussion, since it is one of a series designed by its author to apply to certain branches of legal study the historical method of investigation, and to make a careful and judicious comparison of the laws of different nations.

It is good for the busy lawyer to turn now and then from the examination and comparison of precedents and authorities, and to fix his attention upon the current of events which has swept down and flung into a heap the great principles of law, and has conducted in no small degree to the confused and involved condition of modern jurisprudence. While he does this, he stands on higher ground, from which the tactics of daily practice seem unimportant and insignificant. In the *Historical Law Tracts* we have one

of the earliest attempts made by a great lawyer to record the fruits of such an outlook and meditation. Their author was convinced of the value of the historical method. He says, in his Preface, "Law in particular becomes then only a rational study, when it is traced historically, from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society." My readers will probably not disagree with his Lordship as to the value of the method, although they may not be so well satisfied with the manner in which it is sometimes employed by modern writers.

Before beginning an examination of the Tract to which I have referred, I may be permitted to make a few remarks respecting the volume in which it is contained. This book is in the library of the Society of Solicitors of the Eastern District of Fife, and has had an eventful and interesting history. It is a copy of the first (1758) edition. It bears in faded ink on the fly leaf these words, "To the Reverend Mr. Hugh Blair, presented by Henry Home." The conjunction of these names is of much interest, as it conjures up a picture of old Edinburgh society—lawyers, divines, philosophers, literateurs, and pedants, as it was seen by Dr. Johnson and James Boswell of Auchinleck. "Henry Home" was, of course, Lord Kames himself,—judge, jurist, philosopher and critic,—whose *Principles of Equity* and *Historical Law Tracts* gave him a name among contemporary lawyers, which his *Elements of Criticism* extended beyond the bounds of his native country. "The Reverend Hugh Blair" was the greatest preacher of his day, and the first professor of rhetoric and *belles lettres* in the University of Edinburgh, whose sermons are still read for their beauty of language and grace of expression. Giver and receiver have long since passed away, but the book is with us, and in it survives the opinion formed by its Author upon one of the gravest matters which can concern

a civilised community—the relation subsisting between crime and punishment.

“Of the human system no part, external or internal, is more remarkable than a class of principles intended obviously to promote society, by restraining men from harming each other.” These are the opening words of the Law Tract, and they express Lord Kames' idea of the design of the Criminal law. It was intended to promote Society, and its mode of doing so was by restraining men from harming each other. Punishment was the means adopted with this end. Therefore, the development of the Criminal law has proceeded along lines, whose direction has been settled for each epoch by the views generally entertained at the time respecting the relation of guilt to punishment.

When a man does harm to another we look for two consequences, a greater or less *uneasiness of conscience* on the part of the wrong-doer, and a greater or less *resentment* on the part of the wrong-sufferer. These are the factors in the development of Criminal law, and the manner in which the natural resentment of the wrong-sufferer is gratified or satisfied, forms a criterion by means of which the history of that law may be divided into three periods:—

- (1) The period during which the resentment of the wrong-sufferer was satisfied by his inflicting, at his own discretion, corporal chastisement upon the wrong-doer:
- (2) The period during which the resentment of the wrong-sufferer might be satisfied by a pecuniary composition paid by the wrong-doer; and
- (3) The period during which the resentment of the wrong-sufferer has been satisfied by the punishment of the wrong-doer at the instance of the State.



We have seen that, when a man does harm to another, a greater or less degree of uneasiness of conscience is felt by the wrong-doer. The effect of this uneasiness is three-fold,—it produces a sense of guilt, it imparts a feeling of remorse, and it arouses a dread of punishment. In hardened offenders these effects are barely perceptible, yet they do exist in a modified form. Thus we may say that the penal consequences of a crime precede the detection of the criminal, and that escape from detection does not always imply immunity from punishment. The combined effect of a sense of guilt, a feeling of remorse, and a dread of punishment, may be, and frequently is, terrible to bear. It is partly on this account, that a wrong-doer, when he has been justly punished, has a certain feeling of relief, and is himself conscious of the justice of his punishment. In this manner it has come to pass that not only from the point of view of the injured person, but also from that of the offender, the principle that punishment ought to follow crime, is freely admitted as a sound doctrine of jurisprudence.

This principle is broadly stated in the proposition that every person provoked by injury has a right of revenge. This is a law of nature. It has not always been restricted to voluntary wrongs, having been at times extended to involuntary, but it is the root-principle of the law of punishment. It is not easy for a primitive people to draw a distinction between voluntary and involuntary wrongs. The so-called crimes of Oedipus were purely involuntary, and without any criminal intent, yet the Greeks considered his terrible punishment just and fitting. It is true that Sophocles in the *Colonos* hints at a reparation made by the gods to the King for his unmerited sufferings—"And so he passed away, a man neither to be mourned for, nor spent with sickness, but admirable, if ever mortal was." (*Oedipus at Colonos*, 1663.) Sophocles, however, was writing as a poet, not as a jurist.

The full gratification of natural resentment demands three things—the personal suffering of the wrong-doer in the same degree as the wrong-sufferer; such suffering inflicted, or instigated, by the wrong-sufferer; and knowledge on the part of the wrong-doer that his punishment comes from the person he has wronged. The great tragedians have always observed these principles. To go back once more to the Greek tragedies, as illustrating primitive conceptions, we find that Medea, having perpetrated her horrible revenge upon Jason for his perfidy, took care, at much risk to herself, to face her false husband and tell him that she had done these evils from which he was suffering—"Thy heart, as is right, have I wounded."

We gather from ancient enactments and edicts that there was no limit to the extent to which a wrong-doer might involve others in the penal consequences of his misdeeds. His punishment might reach his nearest and dearest, and even the domestic animals which belonged to him. This is recognised in the criminal codes of Athens, Macedonia, Scythia and Carthage, and the idea occurs in many passages of the Old Testament scriptures. A well-known instance is the pestilence which was sent to destroy the Israelites, as a penalty for the wrong done by King David in numbering the people. The *actio noxalis* of the Romans enabled a person, who had suffered injury through a domestic animal belonging to another, which had done mischief contrary to its nature, to obtain possession of that animal, even in the hands of a *bonâ fide* purchaser, in order that it might be punished for the mischief it had wrought. Self-preservation, as well as resentment, had a share in suggesting this law, but the fact is mentioned here to show that passion does not rest satisfied with a human victim. Man's resentment is, and always has been, a terrible thing. Throughout the ages, blood-feuds have carried fire and sword into the homes of the innocent for the fault of the guilty, and even yet in

many parts of the continent there are family quarrels and vendettas, in which the original offence of one man has caused the death of scores.

We have now arrived at a curious stage in the development of the Criminal law, and one which powerfully influenced its history. By dwelling on these two ideas,—that the wrong-doer justly suffers punishment, and the wrong-sufferer justly inflicts it,—men came to regard punishment as a sort of debt, which the wrong-doer ought to pay. This conception is clearly traced in the Latin idiom, in which “to suffer punishment” was expressed by several phrases—*pœnas dare*, or *luere*, or *pendere*, or *solvere*—which all have the signification of discharging a debt, or of giving or paying something.

This conception naturally led to two others. The first of these was the possibility of the punishment of the wrong-doer being passed to a substitute. This had not a lasting effect. Vicarious punishment never occupied a prominent place in jurisprudence. The reason is obvious. It was defective in one of the main and essential satisfactions of resentment—that the wrong-doer must suffer *personally*. In matters of superstition or religion it has been more frequently applied. For example, we are told that it had been a custom in Carthage to sacrifice to one of the tutelary deities of the city a number of the sons of the most eminent citizens; but a practice had gradually been established of avoiding the families of the nobles, and of sacrificing children reared for the purpose. On one occasion, when the city was besieged by the Syracusans and in imminent peril, the superstitious people fancied that their calamities were due to their remissness, and promptly sacrificed two hundred sons of the nobles, as a vicarious propitiation for the wrong-doing of the citizens.

The other conception to which I referred is of more consequence. This was the idea that a crime might be

atoned for, if the wrong-doer paid a pecuniary composition, or *vergelt*, as our Anglo-Saxon ancestors called it. This introduced the second period of development of the Criminal law.

The conceptions of jurisdiction and a judge had been growing before this date. In a paper on "Laws and Law-making," which appeared in this magazine in November, 1903, I endeavoured to give a concise statement of the theories of some modern jurists on the growth of these conceptions. It is, therefore, unnecessary to go over the ground here, and it suffices to say that, as regards Criminal law, the first adjudications would probably be sought to settle the manner in which the identity of the wrong-doer should be determined, or in which the amount of composition should be fixed. Where the wrong-doer was caught in the act, vengeance was summary. Ample provision for this is made in several ancient bodies of law, and, as a safeguard to counterbalance the risk of a too hasty presumption of guilt, cities of refuge and sanctuaries were established, to which the criminal might fly for temporary safety, while his case was being investigated. The necessity for a tribunal to determine identity arose in those instances where the wrong-doer was not caught in the act, or immediately pursued. In order that justice might be done, some person had to be invested with power to determine such questions, and in such person we have the earliest suggestion of a criminal judge.

It is certain, however, that about the same period as that at which men were forced to accept the intervention of a judge of some sort, a system of pecuniary composition for crime was being generally adopted. The offer of a sum of money is in certain conditions the most natural shape which satisfaction for wrong-doing can take. "Avarice is not so fierce a passion as resentment, but it is more stable, and by its perseverance often prevails over the keenest

passions." Man-slaughter was in ancient times one of the most common forms of crime. Often there was no near relative of the victim whose anger would be keenly aroused, and thus the measure of resentment in the survivors was so slight that prudence easily overcame passion, and persuaded them that a permanent good, such as resulted from the receipt of money, was better than a momentary gratification, such as arose from the execution of revenge. The practice spread rapidly. How old it is we do not know. It is assuredly as old as Homer:—

"A sire the slaughter of his son forgives ;

The price of blood discharged, the murderer lives."

*Iliad IX* (Pope).

The famous law of the Twelve Tables,—"*Si membrum rupit, ni cum eo pacit, talio esto*,"—proves that in the days of old Rome a man could compound his crime. Tacitus informs us that the Germans recognised this method of reparation,—"*luitur enim etiam homicidium certo armentorum ac pecorum numero*." In a set of old laws the idea was carried so far that one who took revenge before he demanded satisfaction had, if possible, to restore what he had taken. Another code checked the prosecution of private revenge by imprisoning the man who refused to accept composition ; and, *per contra*, imprisoned the wrong-doer who refused to pay composition, in order that he might be restrained from doing more mischief. There is abundant proof of the elaborate nature of this system. Tables exist which fix the appropriate composition for all sorts of offences, from the gravest to the most trivial, from compassing the death of the king to throwing a pail of water over a neighbour. These points may be elucidated by a study of the laws of Athens, the Twelve Tables, the Longobards, the Visigoths, the Anglo-Saxons, and many others. I shall not burden my readers with the references. They are given at length in the Law Tract which we are considering.

The system had one important effect. By accustoming men to forego their right of taking vengeance by personally inflicting corporal chastisement upon the person who had done them an injury, the way was made easier for the complete transfer to the State of the right of imposing punishment for crime.

This brings us to the third and last period of the development of Criminal law. That is the period during which the right to punish crime passed from the wrong-sufferer to the magistrate. "There, perhaps, never was in government," says Lord Kames, "a revolution of greater importance than this." Before that revolution there was no real government, because a governor is such only in name, so long as he does not possess the power of the sword. In a less degree we had an instance of this after the Rebellion of 1745, when the influence of the Highland chiefs and feudal superiors in Scotland was broken once and for all by the abolition of the hereditary jurisdictions with their rights of "pit and gallows."

Like all human reforms, the blessing brought by it was not unmixed. It left in many instances a feeling of unsatisfied resentment, which displayed itself in private assassinations, poisonings, and duels. The many deaths which took place from these causes in every country of Europe were a tax paid for the reform of criminal administration. Even yet in "Lynch" law and mob violence, we have a recrudescence of the same spirit.

The right of the public magistrate to interfere seems to have begun, as might be expected, in crimes of a public nature, where the composition was forfeited to the State purse or Fisk; but, once established, it extended to all crimes. Here another change resulted. There was, as we have seen, a strong temptation for a private individual to forego his revenge in consideration of a pecuniary composition: there was less inducement for the State to do so.

Consequently, pecuniary composition in the form of arbitrary fines was restricted to minor offences, and exemplary punishment was awarded to the more heinous crimes. Mutilation, demembration, and death became common penalties for the transgression of the law. Other circumstances than gratification of resentment came to be recognised as factors in the determination of suitable punishment, such as the immorality of the action condemned, and its evil tendency.

These considerations led to a further conception. The sovereign was the obvious arbiter, to whom the measure of punishment ought to be referred, and from this date we find kings and rulers intervening to declare what penalty should be inflicted in respect of particular crimes. For many centuries such intervention was made use of, sometimes to increase, and sometimes to diminish, the sentence of the judge. But as criminal jurisdiction became firmly established, and a definite scheme of punishment was formulated, the sovereign interfered only to reduce the punishment, or to pardon the criminal. Thus arose the royal prerogative of mercy.

Such, according to Lord Kames, is the history of the Criminal law. Founded on the natural right of the wrong-sufferer to satisfy his feeling of resentment by inflicting corporal chastisement upon the wrong-doer, it rose to the higher conception that is the duty of the sovereign power of the State to restrain wrong-doing by punishing crime. The gain is well expressed in the closing words of our author—"Happy it is for civilised societies, that the authority of law hath, in a good measure, rendered unnecessary this savage and impetuous passion; and happy it is for individuals, that early discipline, under the restraint of law, by calming the temper and sweetening manners, hath rendered it a less troublesome guest than it is by nature."

Up to this point I have been expressing in my own words

but in the spirit of the original, the ideas of Lord Kames. I propose now to mention several circumstances which indicate that his Lordship did not give sufficient weight to some of the most important principles of punishment. Satisfaction of resentment must have played an important part in the establishment of the early codes of Criminal law, but it was never the sole, or even the principal inspiring influence. *Self-preservation* operated to an even greater extent. A man's personal safety is bound to receive consideration before he seeks to gratify his passions. To provide for that safety must therefore have been the primary care of criminal codes.

It may be laid down as a general proposition that in awarding punishment for wrong-doing the objects sought to be attained are the prevention of crime and the reclamation of the criminal, rather than the compensation of guilt and suffering by weighing out so much penalty for so much fault. If that be so, it is not quite correct to say that its fundamental idea is to satisfy the natural resentment of the wrong-sufferer. It is obvious that if a person is allowed with impunity to do harm to another, he himself is encouraged to repeat the offence, and others are encouraged to go and do likewise. Men are slow to follow a good or noble example, but quick to imitate the bad or the mean. The law, therefore, throws its weight into the scale by attaching punishment to crime. The man who will not refrain from harm because it is evil, will hesitate to do a harmful act, which brings with it a severe punishment.

In every system of jurisprudence we discover facts in regard to the practical application of punishment, which prove that gratification of resentment is a minor factor. Of course, we have no means of knowing whether these things were in the earliest codes, but as they are connected with a matter which was as apparent to men living under the most ancient civilisation as they are to us, and human



nature in this respect being the same then and now, we can reasonably infer that the facts were at that time not unlike what we perceive in more modern times. These facts may be summed up in this proposition,—*in no civilised community is punishment exclusively regulated by the gravity of the crime.* One exception would suffice to establish this proposition, but I shall adduce five:—

- (1) Punishment is increased in respect that the offender has previously committed a similar offence.
- (2) Punishment is increased in respect that the offence is one which is especially difficult to detect.
- (3) Punishment is increased in respect that the offence is one which is apt to lead to greater crimes.
- (4) Punishment is increased in respect that the offence is one which can be committed with peculiar facility.
- (5) Punishment is increased in respect that the offence is one which is specially destructive of public security.

We shall readily perceive that in each of these cases punishment cannot be increased in respect of any augmentation of the resentment of the wrong-sufferer. Take the first, for example. If a man, who has never been known to commit a theft, steals five shillings, his punishment is much lighter than that of a man who steals the same sum, but has been twenty times previously convicted of theft. Indeed, if the first offender stole five pounds, he would not be so severely treated. If resentment were the inspiring cause, the punishment of the two men, who each stole five shillings, would be the same; that of the man who stole five pounds would be heavier. The Criminal law in this instance is seeking to fulfil what Lord Kames recognises as its prime function,—“to promote Society by restraining men from harming each other.” It seeks this end, firstly, by discouraging the repetition of offences, and, secondly, by secluding the habitual offender.

In like manner, the resentment of the wrong-sufferer is the same, whether his wrong is of a kind which is easily detected, or the reverse. Nevertheless, the law increases the penalty and, by thus making the crime especially unprofitable, endeavours to deter men from committing it.

Again, a man who trespasses upon land in the unlawful pursuit of game by day, incurs a much less punishment than the man who does so by night. The resentment of the game-preserver whose coverts are invaded is the same; but, it having been observed that midnight forays often end in murder, this form of poaching is discouraged by pains and penalties of an exemplary sort.

One who steals a sheep incurs a greater punishment than one who steals ten times a sheep's value of goods. The resentment in the latter case should undoubtedly be greater, but then it is less difficult to steal sheep in open pasture than goods in a locked warehouse, and the exposed nature of the flocks must be compensated by increased punishment.

Lastly, a man who loses £500 by fraud will have more natural resentment than one who loses £50 by a forged cheque; yet the forger gets a heavier sentence than the swindler, for the reason that the falsification of documents strikes at the very foundation of public life.

Such instances show that, in practice, there is no relation between the resentment of the wrong-sufferer and the punishment of the wrong-doer; but that there is a close relation between the punishment of the wrong-doer and the prevention of crime.

There is another aspect of the matter, which must not be overlooked. Punishment must be sufficiently severe to act as a deterrent, notwithstanding the uncertainty of its infliction. The law specifies the punishment for a crime, but it is always a matter for doubt, whether a particular criminal will be punished. The crime may not be detected; the criminal may not be traced; if traced, there may not be

evidence to convict him ; if there is evidence, the prosecutor may fail to convict him through some error in procedure, or some blunder on the part of the witnesses, the judge, or the jury. Criminals are well aware of the many chances in their favour, and would take the risk of the small chance in favour of the prosecution, if it were not that that chance is supported by the risk of a punishment of which they are afraid. This, however, has nothing to do with the resentment of their victims.

These considerations are mainly theoretical, but we have, in considering the subject, an advantage which was not possessed by Lord Kames. We have knowledge of the way in which new communities, in California, Australia, and elsewhere, have evolved their own Criminal law. The basis of this is always, as we should conclude *a priori*, the prevention of crime, with the object of protecting the community from loss and damage. So soon as the new township has sufficient coherence to do so, a Vigilance Committee is formed, to whom is delegated the duty of preserving order. It is a strong confirmation of what has been urged on theoretical grounds, that we find a similar principle ruling the practical application of the Criminal law to the business of a community otherwise disorganised.

I fancy I hear some hard-headed, practical lawyer inquire — "*Cui bono?* What end is served by this discussion of the theories of an old Scottish judge about punishment for crime?" I reply, that our discussion has served a useful and practical purpose.

In the first place, there is the benefit to which allusion was formerly made, and which arises from the wider view that is obtained, when one ascends from the routine of daily practice to the higher ground of historical jurisprudence.

My interlocutor may say that such benefit is sentimental and not practical, and therefore not worthy of serious consideration by a business man. But there is another, which is

certainly both practical and profitable, The vexed question of heavy *versus* light sentences is really governed by the decision to be pronounced upon the point which has been raised in this paper—whether the punishment of criminals is designed to gratify resentment or to prevent crime. If we hold that the punishment inflicted upon the wrong-doer is meant to satisfy the natural resentment of the wrong-sufferer, then we must also hold that it ought to “fit the crime.” A heinous crime would have to receive exemplary punishment; a minor offence, a light one. But if we hold that punishment is designed to prevent crime, then we reduce the issue to a mere question of fact. When a judge can show that by the imposition of light sentences he has diminished the amount of crime within his jurisdiction, he is justified in persevering in the course which he has adopted. If another judge can point to a similar reduction as the result of heavy sentences, he is equally justified in continuing his methods. We thus alter the aspect of the question. From a discussion *de gustibus*, as to which we know there is no disputation, it becomes an inquiry as to facts, which are capable of ascertainment. I think this is a real and practical gain.

HENRY H. BROWN.

## II.—THE LAW OF THE UNIVERSITIES.

### II. PREROGATIVE AND LEGISLATION.

FROM the thirteenth century charters, usually letters patent under the Great Seal,<sup>1</sup> had been granted to the universities and colleges, the earliest being attributed to John.<sup>2</sup> They generally recognised university privileges

<sup>1</sup> Not now with the additional formality of William the Conqueror's charter to the City of London, which was

Bitten with his tooth  
In token of sooth.

<sup>2</sup> It was really a legatine ordinance. Anstey, 1; 2 Rashdall, 349.

as pre-existing, including some now obsolete, such as exemption from subsidy and purveyance. The most extensive privileges were those conferred on Oxford by the charter of 1523, issued at the instance of Wolsey. Charters were also granted to the colleges, to the earlier ones after they had been founded for some time, to the later at the time of their foundation. The Act of 1545 for the dissolution of colleges (37 Hen. VIII, c. 4), enabled the Crown to found new colleges, such as Christ Church and Trinity, Cambridge.<sup>1</sup> A corporation, the creature of the Crown, may exist by charter or by prescription, which presumes a charter, even in cases where historical evidence makes it morally certain that no charter ever existed.<sup>2</sup> The grant of a charter is at the pleasure of the Crown, as long as it is not repugnant to Common or Statute law.<sup>3</sup> A corporation may also be created directly or indirectly by Act of Parliament; in the latter case the Crown is empowered to grant a charter in a particular instance. The earliest college charter appears to be that of University in 1317, followed by Oriel in 1324. In some, as that of St. John's, Cambridge, there is a recital of the King's licence to hold lands in mortmain and a nomination of the original master and fellows. The charter generally gave the official name of the college, often different from the popular one. For instance, All Souls is "The College of the Souls of All Faithful People departed."

At present when a new university or college is founded, the charter must by the College Charters Act 1871 be laid before Parliament. The charter once granted cannot be amended; it must be recalled by writ of *scire facias* or *quo*

<sup>1</sup> The Chantry Act of 1547 (1 Edw. VI, c. 14) exempted from its operation colleges and chantries in the universities.

<sup>2</sup> The Crown may delegate its power of erecting corporations, as to the Chancellor of Oxford to incorporate matriculated tradesmen.

<sup>3</sup> It is on a charter of James I, of 12 March, 1603-4, that the representation in Parliament of Oxford and Cambridge depends.

*warranto* or a supplemental charter granted.<sup>1</sup> There need be no surrender of an old charter before the grant of a new one.<sup>2</sup> The acts of the corporation must conform to the charter, otherwise they are *ultra vires* and void, as if the university were to pass a Statute conferring on the Chancellor's Court jurisdiction in probate. It was held in a famous American case that a charter was for some purposes a contract.<sup>3</sup>

The law by which the universities were originally governed was, according to Lord Hardwicke in one of the Bentley cases, a compound of Civil and Canon law. Other authorities maintained that they were subject to Civil law only.<sup>4</sup> Be this as it may, Canon law was an important subject of study in the English universities even after the injunctions of 1535, and doctors in Canon law took precedence of all other doctors. At most colleges there were canonist fellows, and as lately as 1624 one of the objects of the foundation of Pembroke, Oxford, was the study of Civil and Canon law. The last application for a degree in Canon law seems to have been by C. Browne of Balliol, in 1715. Nothing was done owing to the death of the applicant. The connexion of Canon law with the universities was in full vigour by the time of the promulgation of the Decretals (1234), which were addressed to the universities of Paris and Bologna.<sup>5</sup> The Reformation also marked the disappearance of the old *trivium* and *quadrivium* or *septem disciplinae*,<sup>6</sup> and education broke with scholasticism.

<sup>1</sup> For the grounds of refusal to seal a supplemental charter see *Ex parte Society of Attorneys*, [1872], L. R., 8 Ch. 163.

<sup>2</sup> *Case of the University of King's College, New Brunswick*, [1842], Forsyth, Cases and Opinions, 383.

<sup>3</sup> *Dartmouth College v. Woodward*, [1819], 4 Wheaton, 518.

<sup>4</sup> As Chapman, *Inquiry into the Right of Appeal* (1752).

<sup>5</sup> For Canon law in England, see Stubbs, *Lectures on Medieval and Modern History*; Maitland, *Canon Law in England*. It is called *jus pontificium* in the injunctions.

<sup>6</sup> Immortalised in the line—

*Lingua, tropus, ratio, numerus, tonus, angulus, astra.*

The universities and colleges were not, as has already been said, allowed to legislate entirely for themselves, but were and are subject to the intervention of Parliament, the Crown both by virtue of the prerogative and—after the Reformation—by virtue of its right as successor of the Holy See, and judicial decisions of Courts and visitors. Early legislation dealt more with discipline and property than with education. Under the head of discipline the most important branch was the maintenance of orthodoxy. Oxford was at one time tainted with the suspicion of heresy. It was specially named in the Assize of Clarendon (1166),<sup>1</sup> and it refused to condemn the doctrine of Wyclif.<sup>2</sup> But circumstances were too strong for it. The Holy See of course worked in the direction of the preservation of orthodoxy. The Council of Vienne (1312) decreed that teachers of Hebrew, Arabic, and Chaldee at Paris, Oxford, Bologna, Salamanca, and the University of the Roman Curia, must be Catholics.<sup>3</sup> The case of teachers of other branches of learning was no doubt an *a fortiori* one. Who were the proper authorities for the maintenance of orthodoxy was for a long time a disputed question at Oxford, but not as much at Cambridge. The mendicant orders made vigorous attempts to escape graduation in arts, and to bring the theological instruction of the university into their own hands. The great contest was in 1314, the result

Each corresponds to its peculiar heaven, Dante, *Convivio*, ii, 14. Skelton says of Wolsey ("Why come ye not to Court?") :—

He was but a poor master of art  
God wot had little part  
Of the quadrivials,  
Nor yet of trivials,  
Nor of philosophy.

<sup>1</sup> *Prohibet etiam dominus Rex quod nullus in tota Anglia receptat in terra sua vel socr sua vel domo sub se aliquem de secta illorum renegatorum qui excommunicati et signati fuerint apud Oxeneforde.* But possibly this may be the city, not the *studium*.

<sup>2</sup> 2 Rashdall, 428.

<sup>3</sup> Adopted into the Clementine Constitutions, v, 1.

being the submission of the friars. Whatever their shortcomings may have been, the schools of the friars at Oxford—they had no colleges—at least produced Roger Bacon, Duns Scotus, and William of Ockham.<sup>1</sup>

After the Reformation, to be a member of "the Church of England as by law established,"<sup>2</sup> was a necessary condition precedent for holding most university or college offices or for proceeding to a degree. In 1581 the Chancellor, the Earl of Leicester, directed that no scholar should be admitted to any college or hall before subscription to the xxxix Articles.<sup>3</sup> If the age were under sixteen, only subscription was necessary; at sixteen or over the oaths of allegiance and supremacy. The oath of supremacy must also have been taken before admission to a degree (1 Eliz., c. 1, s. 25). By the Canons of 1603, No. xxiii, all members of a college and the college servants were to receive the communion four times a year. The Act of Uniformity, 1662, carried out the same principle, and the obligation imposed by it as to the universities was not affected by the Toleration Act, 1689, and the Roman Catholic Relief Act, 1829. Before admission of a head or fellow, further preliminaries were required. In addition to those already named, he must have taken the oath of abjuration of papal authority, and must have made the declarations of conformity and against transubstantiation, and must have received the Sacrament. A corporation keeping or maintaining a schoolmaster who did not repair to church was

<sup>1</sup> See Thomas Eccleston (circ. 1250), *De Adventu Fratrum Minorum in Anglia* in Brewer's *Monumenta Franciscana* (1858); W. G. D. Fletcher, *The Black Friars at Oxford* (1882); A. G. Little, *The Grey Friars in Oxford* (1892); *Cambridge Hist. of Eng. Lit.*, vol. i; *The Scholars of Paris and the Franciscans of Oxford*, by Dr. Sandys (1907). In *Barnes v. Stewart* ([1834], 1 Y. & C. 119), the Court of Exchequer in Equity held that Matthew Paris is not evidence of the date of the establishment of the Franciscan order.

<sup>2</sup> The statutory phrase.

<sup>3</sup> Numerous examples of entries of the test on the college books will be found in Baker, *Hist. of St. John's College, Cambridge*, i, 552 (ed. 1869).



liable to a fine of £10 a month during his default (23 Eliz., c. 1). The conditions, other than subscription, were rendered unnecessary by subsequent legislation. From 1832 the degrees of B.A., B.C.L., and B.M., might have been taken without subscription. Before that date Oxford excluded nonconformists from these degrees by rules of the university, Cambridge by rules of the colleges. The law as it stood up to 1871 is thus given in the Oxford University Calendar of that year:—"Before admission to the degree of Master of Arts, Bachelor of Divinity, or Doctor of any of the three superior faculties, every person is required to make and subscribe a declaration of assent to the Thirty-nine Articles and to the Book of Common Prayer, taken from the 36th Canon, and to promise that he will observe the statutes, privileges, customs, and liberties of the university, and will act faithfully, creditably, and honestly in the two houses of Congregation and Convocation, especially in all that concerns graces for degrees, and in elections." The promise to observe the statutes, &c., is still enforced, but the University Tests Act 1871 (34 & 35 Vict., c. 26),<sup>1</sup> abolished subscription to the articles, all declarations and oaths touching religious belief, and all compulsory attendance at public worship in the Universities of Oxford, Cambridge and Durham.<sup>2</sup> There is an exception confining to persons in holy orders of the Church of England degrees in divinity and positions restricted to persons in holy orders, as the divinity and Hebrew professorships. Colleges founded after the Act are not within it.<sup>3</sup> The newer universities adopt its principle without the exception.<sup>4</sup> The Universities Act of 1877 enacts that nothing

<sup>1</sup> The history of the Act will be found in A. V. Dicey, *Law and Public Opinion in England* (1905). The moral aspect of subscription is the subject of Essay iv in *Aids to Faith* (1861).

<sup>2</sup> See *Green v. Peterhouse*, below.

<sup>3</sup> See *R. v. Hertford College*, below.

<sup>4</sup> An example is s. x of the charter of the Victoria University of Manchester: "Provided that it shall not be lawful for the Court by any statute or otherwise to

in the Act shall be construed to repeal any provision in the Act of 1871, with a saving clause in favour of the erection or endowment of an office (other than a headship or fellowship), requiring the possession of theological learning, and of religious instruction and morning and evening prayer in colleges.

The Crown influenced the universities by—besides charters—positive direction, dispensation from and suspension of existing law, and visitation directly or by delegation. The interference really supplied the place of the commissions of modern times.<sup>1</sup> In 1231 and 1318 the King acted through the Sheriff of Oxfordshire, in the former case to carry out the compromise of 1314, already noticed. Edward III in 1375 issued a mandate in favour of graduates in law. Richard II in 1395 called on the Chancellor of Oxford to root out Lollardism and to report on Wyclif. Instances better known are the injunctions of Thomas Cromwell to Oxford and Cambridge in 1535 and the visitations of 1549 and 1559. Instances of interference in the case of individuals were not uncommon under the Tudor and Stuart Kings, and even earlier. Thus in 1358 Guido di Limosano, Secretary of the King of Sicily, was admitted to incept by the King's letters.<sup>2</sup> In 1377 a mandamus went to the Chancellor of Oxford to banish Lollard scholars.<sup>3</sup> Henry IV granted permission to graduates to sue for papal provisions contrary to the Statutes of Provisors until this was forbidden by 9 Hen. IV, c. 8. In

impose on any person any test whatever of any religious belief or profession in order to entitle him or her to be admitted as a professor teacher student or member of the university or to hold office therein or to graduate therein or to enjoy or exercise any privilege therein."

<sup>1</sup> The power of the Crown to issue a commission to inquire was much discussed after the issue of the commission of 1850. Sir R. Bethell and other counsel advised against it in 1851; the Attorney- and Solicitor-General and the Advocate-General were in favour of the power. Leave to be heard before the Crown in Council by the objectors was refused by Order in Council. Oxford Report, 22—38. The Scottish University Commissioners who reported in 1831 were appointed to visit, not to inquire.

<sup>2</sup> Little, 43.

<sup>3</sup> Cited Sir T. Raym. 110.

1577 the Chancellor, acting for the Queen, forced John Underhill as Rector upon Lincoln College.<sup>1</sup> James I in 1618 ordered Wadham to elect his nominee Warden;<sup>2</sup> James II did the same at Magdalen; and immediately afterwards William III sent a mandamus to King's to the same effect.<sup>3</sup> These attempts and others were not always successful. Sometimes degrees were conferred on the recommendation of the King or the Chancellor, as M.B. on Sydenham, the great physician. Suspension of and dispensation from college statutes was asserted as part of the prerogative before the Bill of Rights (probably in imitation of papal bulls of exemption), and the right appears still to continue. For the provisions of the Bill of Rights as to dispensation and suspension apply only to statutes of the realm, and the Crown, as creator of a corporation, necessarily has authority to suspend and dispense from the operation of the statutes and by-laws of its creature. The statutes of Emmanuel were suspended by Charles I.<sup>4</sup> Both Henry More and Cudworth, the Cambridge Platonists, were in 1675 and 1679 respectively dispensed from residence at Christ's. A royal dispensation to a fellow of St. Catharine's to hold with his fellowship a living of the value of ten marks in the King's books is mentioned in the argument of a case in 1791.<sup>5</sup> In the case of Queens' a dispensation was presumed after the lapse of two hundred and fifty years.<sup>6</sup> In the case of the same college the President was allowed to hold his office by dispensation, although a layman, and therefore disqualified by the statutes. It was granted by the Crown through the Lord Chancellor (Lord Brougham).<sup>7</sup> The

<sup>1</sup> A. Clark, *Hist. of Lincoln College*, 49.

<sup>2</sup> J. Wells, *Hist. of Wadham College*, 41.

<sup>3</sup> J. R. Bloxam, *Magdalen College and James II*, 272.

<sup>4</sup> 2 Mullinger, 316.

<sup>5</sup> *R. v. St. Catharine's College*, 4 T. R. 233.

<sup>6</sup> *Re Queens' College* [1821], Jac. 1. But notice that the college was a royal foundation. The dispensation was for electing two Middlesex or City of London fellows, the statutes providing for only one.

<sup>7</sup> Grant, 530 (n.).

best-known case is one which occurred in 1815, though it is not a university case. But the principle is the same. The statutes of Eton College provided that no fellow should hold any spiritual preferment. Queen Elizabeth permitted a fellow to hold such preferment up to a certain value without forfeiting his fellowship, with a *non obstante* proviso. The fellows were allowed by the visitor (the Bishop of Lincoln) and assessors to take the benefit of the dispensation, on the ground that the Bill of Rights could not be construed to affect the exercise of a dispensing power which had been assumed a century before that enactment had become law.<sup>1</sup> The power of dispensation was sometimes exercised, or attempted to be exercised, by the college itself. In one case the Warden, three bursars, five deans, and five senior fellows had power to dispense with the absence of a fellow. It was held that this dispensation was not exerciseable by a majority. The act was not a corporate act, and 33 Hen. VIII, c. 37, only applies to corporate acts.<sup>2</sup> By many of the old statutes an oath against obtaining dispensation was a necessary condition for admission as fellow. Dispensation has been—and in some cases still might be—granted by visitors, *e.g.*, against vacation of fellowship by failure to take a particular degree in a given time.<sup>3</sup> Sometimes it was granted by Convocation, especially as against the residence for degrees necessary under the Laudian Statutes, or for smaller matters, such as university masses and funerals.<sup>4</sup>

<sup>1</sup> P. Williams, *Report of the Proceedings against the Provost of Eton College* (1816).

<sup>2</sup> *New College Case* [1563], Dyer, 247a. An oath contrary to the Act of Henry VIII is void by sect. 4 of the Act.

<sup>3</sup> See the case of Mark Pattison in 1852; Clark, *Hist. of Lincoln College*, 192.

<sup>4</sup> Examples will be found in W. G. Searle, *Grace Book I* (Cambridge), for the years 1501—1542 (1908).

## III. VISITATION.

(a) *The Universities.*

The Bishops of Lincoln appear to have visited the University of Oxford on several occasions before Oxford was made an independent See by Henry VIII. The Bishops of Ely claimed the same powers for Cambridge. It was only by slow degrees that this claim and the appeal from the Chancellors' Courts were abandoned. Later the Archbishops of Canterbury claimed visitation to the exclusion of the bishops.<sup>1</sup> This seems to have been first asserted by Archbishop Peckham in 1281. The right of the Archbishop to visit, except for heresy, was resisted by the universities. Richard II decided in favour of the right in 1397, and it was indirectly confirmed by Parliament in 1407 (9 Hen. IV, c. 1), and 1411 (13 Hen. IV, c. 1). The visitation of Queen's by the Archbishop of York was saved, if sufficiently proved.<sup>2</sup> Cardinal Pole visited both universities *jure legatino*, and finally Charles I himself decided in Council in 1636 that Archbishop Laud could visit *metropolitice* on emergent cause to be made known to the King.<sup>3</sup> The papal rights of visitation (if any) were transferred to the Crown by 25 Hen. VIII, c. 21 (enabling the Crown to visit colleges and other corporations by commission),<sup>4</sup> and by the Act of Supremacy, 1 Eliz., c. 1. By 31 Hen. VIII, c. 14, colleges exempt from the visitation of the ordinary were visitable by the ordinary in whose diocese they were, or by such person or persons as the King might appoint. The Chantry Act of 1547 empowered the commission of 1549 to be issued. It

<sup>1</sup> For the history, see *Report of Oxford Commission*, Evidence, 245; 2 Rashdall, 425, 433.

<sup>2</sup> The right was proved in favour of the Archbishop in 1412, and his successors still remain visitors of the college.

<sup>3</sup> The authorities will be found in Griffiths, 7 (n.).

<sup>4</sup> This Act specially provides that the Archbishop should have no authority by the Act to "visit or vex" any college.

also provided for the founding of grammar schools, for "the further augmenting of the universities," and for altering the nature and condition of obits "to a better use."<sup>1</sup> In 1647 an ordinance passed for the visitation and reformation of the University of Oxford, Selden being one of the commissioners.<sup>2</sup> Charles II appointed visitors in 1660. James II visited by commissioners, the official title of whom was "His Majesty's Commissioners for Ecclesiastical Causes and the Visitation of the Universities, and of every Collegiate and Cathedral Churches, Colleges, Grammar Schools, Hospitals, and other the like Incorporations, or Foundations, or Societies." This appears to be the latest example of visitation by the Crown. In the case of modern commissions they have been no doubt in the first instance royal commissions, but any action called for by the commissions has been taken by Parliament. Frequent objections to the expense of visitations appear in the early records. The rights of visitation as claimed up to the seventeenth century would probably not be admitted now. The universities are civil corporations, the colleges lay<sup>3</sup> eleemosynary corporations. *i. e.*, charities, of either royal or private foundation. As the law stands at present, a civil corporation has the Crown for visitor, the visitation being exercised by the King's Bench Division, not by the Lord Chancellor, as in eleemosynary corporations. But some civil corporations,

<sup>1</sup> The better use has generally taken the form of dining allowances to the fellows.

<sup>2</sup> See M. Burrows, *Register of the Visitors of the University of Oxford, 1647—1658* (1881). Prynne in one of his numerous pamphlets uses the strange graces of his style in favour of the visitatorial rights of the Commonwealth.

<sup>3</sup> Even though the head be required to be in holy orders. The purpose of the founder is the test of whether it be lay or spiritual, *A. G. v. St. Cross Hospital* [1853], 17 Beav., 435. See, too, *Whittie's Case* [1628], Godb. 394. The Dean and Chapter of Christ Church form a spiritual corporation, *Fisher v. Dean of Christ Church* [1725], Bunb. 209. In *Pitts v. James* [1615], Hob. 123, Hobart, C. J., said that the Stat. 1 & 2 P. & M., c. 8, as to devises to spiritual corporations, extended to Trinity, Cambridge, because it was principally intended for the study of divinity.

as municipal and trading, have no visitors. In universities founded by modern charter the Crown is appointed visitor and acts through the Lord President of the Council. There is a doubt whether Oxford and Cambridge have visitors. The university calendars name none. The report of the Oxford Commission (1852) sets forth opinions of Lord Campbell and others that in 1836 they considered the Crown visitor of Oxford.<sup>1</sup> The Order in Council in *Bentley's Case* in 1718 makes the Crown visitor of both universities.<sup>2</sup> The matter must be considered doubtful, and in modern times the recommendations of commissions are only of binding force where they have been clothed with the sanction of the legislature. The question of the existence of a visitor is important from the point of view of procedure. In one of the *Bentley Cases*, in 1723, a mandamus issued to the Vice-Chancellor of Cambridge, because the university made no return of a visitor.<sup>3</sup>

The Crown cannot deprive the universities any more than other corporations of any right attaching by charter or prescription, or grant new charters or impose fresh statutes without their voluntary acceptance. But much of the difference between medieval and modern organisation is of home growth, independent of visitations, and with little interference by Crown or Parliament. It was in this way that the divisions into nations became obsolete at Oxford and Cambridge.<sup>4</sup> At one time it seems to have been almost a condition of the existence of a university. At Bologna the *Universitas Citramontanorum* and *Universitas Ultramontanorum* were each divided into nations, making sixteen in all. Paris had the French, Picard, Norman, and English. Scotland still has them. Oxford and Cambridge were divided into North (*Boreales*) and South (*Australes*). Scotsmen ranked

<sup>1</sup> App. D., 54.

<sup>2</sup> App. C., 40.

<sup>3</sup> *R. v. Cambridge University*, 2 Strange, 1157.

<sup>4</sup> The reason for nations was no doubt the universality of the university system. It was a *studium generale*, and birds of a feather would flock together.

as Northerners, Welshmen and Irishmen as Southerners. Continual struggles between the nations led to severe penalties being denounced against breaches of the peace and to the incorporation into the oath taken by the M.A. on his inception that he would not foster disturbances between the nations. The division into nations is now represented by a faint survival in the two proctors, originally representatives of north and south. Jealousy between the nations led to frequent dissensions in the election to fellowships, for what was north and what was south was not always easy to determine, Worcestershire especially being debateable ground. The jealousy of the universities felt by the citizens culminated in the famous outbreak of St. Scholastica's Day, 10 Feb. 1354, and the preponderance of the universities has only recently been diminished by legislation.<sup>1</sup> It was only in 1825 that the last relics of the penance of the City of Oxford disappeared.<sup>2</sup> Many clauses in favour of the town will be found in the Cambridge Award Act, 1856 (19 & 20 Vict., c. xvii). A recent Oxford Act is 22 & 23 Vict., c. 19, relieving the mayor or any other municipal officer of Oxford from taking the oath up to that time required under a charter of 1248 for the conservation of the liberties of the university.

Oxford and Cambridge only have been dealt with, as visitation of the modern universities is of no historic interest. The supposed classical university at Cricklade (Greeklade), and the medical one at Lechlade (Leechlade), are purely mythical. Ipswich, Stamford, and Cromwell's Durham left no traces.

JAMES WILLIAMS.

<sup>1</sup> 2 Rashdall, 408; Acts of the Privy Council, 1571—1575 (for the history of the fine levied on the City); W. H. Turner, *Records of the City of Oxford* (1880); Prof. Thorold Rogers, *Oxford City Documents* (1891).

<sup>2</sup> Cambridge had its St. Scholastica massacre in 1381. Paris affords the usual parallel. There was a great riot in 1200, and the municipality was severely punished.



### III.—HEREDITY, EDUCATION AND CRIME.<sup>1</sup>

IN this heading I have slightly altered the title of the book on which I am commenting because the word "Personality" will probably fail to convey any clear idea to the general reader, and Heredity is frequently dealt with in the volume before me though not mentioned in the title. Crime being the topic which was evidently uppermost in the Author's mind, I think he should have commenced by putting the two questions: What is a crime? and, What is a criminal? Vague ideas on these subjects have often led to confusion and inaccuracy in the treatment of them, though Dr. Wilson is more free from this defect than many others. It is well known that what is regarded as a crime in one country is not so regarded in another, and that even in the same country the list of crimes varies from time to time. A distinction has indeed been drawn between *malum in se* and *malum prohibitum*; but an act which is *malum in se* is not regarded as a crime unless the law of the country attaches a penalty to it. Now if we seek to trace the origin of crime and the best modes of prevention without fixing the meaning of the term "crime" beforehand, our solution is not likely to be a satisfactory one. Mere ignorance of the law may lead to the doing of an act that comes under the head of *malum prohibitum*, and in other cases a similar act may be done by worthy people from conscientious motives. To arrive at any valuable result we must, I think, confine ourselves to the causes of acts which come under the head of *malum in se*, and this whether a penalty is attached to them or not. But I doubt whether even this inquiry is not too comprehensive. Men will steal who will never commit an assault or other act of violence, and men

<sup>1</sup> *Education, Personality and Crime.* A Practical Treatise built upon Scientific Details, dealing with Difficult Social Problems. By ALBERT WILSON, M.D. London: Greening & Co., Limited. 1908.

who are guilty of acts of gross violence are sometimes strictly honest in their dealings. Our Author distinguishes these two classes of crime, which is not always done. One arises from "illegitimate lust," the other from the desire of "illegitimate gain." Better words, perhaps, might have been found to express the distinction, but it is nevertheless important. It corresponds to a large extent with the distinction between offences against the person and offences against property, except that offences against the person are often committed in attempting to commit an offence against property, or in trying to escape detection and capture afterwards. Still, there is no reason to think that a thief is in general a man of unbridled passions, or that a man of unbridled passions is a thief.

But what is a criminal? Some people apply the term to any man who has committed a crime. They regard every man who has committed a crime under any provocation, however strong, as requiring to be reformed. If he is not convicted a second time, they regard him as having been reformed by his sentence; while if he is convicted again, he is described as unreformed and perhaps as irreclaimable. Yet, everyone knows that there are men who have committed one crime and never committed another, although they were not tried and convicted. Dr. Wilson treats this subject in a satisfactory way. He points out that the man who has stolen something when in want, would probably never have committed the crime if he had enough to supply all his needs: and that many a man who has never stolen anything would have stolen if in need, but found all his wants supplied without resorting to that mode of gratifying them. We are all, he says, "potential criminals." Who, then, is the criminal in the fuller sense of the term? The man, it may be said, who commits crimes repeatedly. But Dr. Wilson seems to give a better answer, viz.: the man who is predisposed to crime, *i. e.*, to do what is *malum in se*.

Children are often born free from disease yet with a predisposition to certain diseases—being more liable than others to catch them, and to do so in a severer form than usual. There is something of the same kind in the case of moral diseases; but our Author thinks that in most cases the fault lies in the defective control which the higher mental power—the personality—has over the lower and more animal appetites and desires. This power is our latest acquisition, and with an imperfectly developed brain it is usually deficient. Actions are often automatic, and men of slow “mentation” cannot control them in time. He mentions a recent case of a man who was hanged for the murder of a woman who had thrown a pot of beer at him in an ale-house. “The total scene between the woman’s act and the death-blow was ten seconds. Considering the probability of the man’s brain being out of action from alcoholism, it might be described as a reflex act . . . There was barely enough time for mentation in such a brain.” Certainly the hanging of this man was not creditable to the judge, the jury, or the Home Secretary.

Dr. Wilson does not attach very much importance to heredity in the strict sense, but he points out that the brain as well as other parts of the body requires healthy nutriment, and that where this is wanting the brain will be starved and the controlling power impaired. From its first conception to the time when it is weaned the child derives its nutriment from the mother, and if she is a hard drinker the effect on the child may be permanently disastrous—alcohol being a most unwholesome food. Scanty and unwholesome food during the years of growth is also very injurious, and Dr. Wilson protests strongly against overworking the brains of young children (and especially of ill-fed young children) at the modern Board Schools. To cite one passage only, “If the child be in good health the State method of over-pressure is wrong, but if the child be

starved, delicate or neurotic, the State inflicts untold mental suffering and injury which may wreck the future career, and even thereby make criminals." He would allow the brain at this age to "lie fallow," and he gives some startling examples of loss of memory caused by the present system, sometimes involving an inability to remember anything that occurred before attaining the age of 10 years. "Feed the children and do not over-press them by way of education," is a summary of the doctor's advice—to which he would add a simple religious training like that proposed by Mr. Birrell. Into the biological parts of the treatise I am not competent to enter, but the Author thinks "environment" of much greater importance than heredity; and the qualities that are supposed to pass from the parents to the children are, he thinks, often due to similar environments. He has, however, frequently found the criminal to be a "sport"—"the only one out of a large family group." These "sports" are not always criminals. Sometimes a man of great talent appears in a family not remarkable for brains, or a giant in a family of moderate-sized persons, and so on; and if such a "sport" is married to a person of the ordinary type there is a marked tendency on the part of the offspring to revert to mediocrity. Dr. Wilson, indeed, advocates a law for preventing certain persons from marrying; but I find in his own book many reasons for believing that no such drastic proceeding is necessary, though there seem to be cases in which the parents should be deprived of the custody of their children and the State should undertake that charge. Every child, he says, belongs to the nation, and should be regarded as a national asset. We should therefore see that this asset is not wasted or injured.

The criminal by pre-disposition is an intermediate between the idiot or lunatic and the ordinary law-abiding citizen, having more ability to control his passions than

the former, but less ability than the latter. He is not wholly irresponsible for his actions like the idiot, nor is he as fully responsible as the ordinary man. The most usual cause of this deficiency is that the brain has been starved, and perhaps overworked also, during the period of youth. But scanty and insufficient food at this period of life is not only a temptation to steal, but may permanently enfeeble the body, and thus render it difficult to earn an honest living in after life, and help to bring about a criminal career.

Dr. Wilson deals with the question of indefinite sentences, referring, however, not to Sir R. Anderson, but to Mr. Tallack. The punishment of the criminal, he says, has two objects: revenge and reform. I do not think either of these is a proper object of punishment—because revenge, as such, is not beneficial to society, and punishment, as such, has no tendency to reform. When, indeed, Dr. Wilson goes on to say of revenge “it is the vengeance meted out to the offender in the hope that fear of the same will be an example to others as well as a future deterrent to himself,” I think if he had used the word “punishment” instead of “revenge” or “vengeance” his statement would have been nearly correct; and that he is not really an advocate of vengeance seems clear when he says of punishment, “It is a poor form of revenge, as it accomplishes so little while it fails in permanent improvement; for the reformation of criminals through prison discipline is practically *nil*.” But he thinks that though the reformation effected by punishment is practically (and I think he might have added theoretically) *nil*, our prisons might be made places of reformation as well as of punishment. “From observation,” he writes, “I should regard no case as hopeless till the Salvation Army methods have failed.” And he gives us the following description of his experience with criminals: “In meeting them both in and out of prison, I

see in the criminal eye deep-seated agony, despair, cunning, hopelessness, and remorse. As the official approaches, he takes on the character of a beast, fury controlled by fear. How different he looks when the doctor approaches—his chief friend in prison! But what a change comes over his whole expression when he spies the uniform of the Salvation Army! I have seen him cry with joy." The difference between a punitive agency and a reformatory agency could not better be characterised. It is useless to try to get the same staff to act as agents for both purposes.

But Dr. Wilson thinks indefinite sentences would promote reform by the hope which they would hold out to the criminal of working out his own salvation, which would be practically excluded by a life-sentence subject to the occasional mercy of the Home Office, or, as Mr. Gladstone suggested, subject to a release when the criminal was no longer able to earn a dishonest living—or, he might have added, an honest one. This is the quality of mercy with all the good strained out of it. "Prison would be curative," writes Dr. Wilson, "if the indefinite sentence were followed up by a wise supervision. All hope of success, however, rests in that one word 'wise.' Most supervision is more or less of a terrorising character, and in no way assists the criminal, but drives him to desperation." That this is true of our present ticket-of-leave and "police supervision" can hardly be doubted. A man cannot earn an honest living while subjected to them, and is forced back into crime. It is one thing, however, to approve of indefinite sentences for reformatory purposes, which may as often have the effect of shortening as of lengthening the probable duration of a definite sentence, and another thing to approve of indefinite sentences for purely preventive purposes, during which no provision is made for bringing any reformatory agencies to bear on the prisoner, and which for that reason are naturally expected to extend over "a lengthened period of years." 1

say nothing of the further provision contained in the Bill now before the House by which the indefinite sentence is to be preceded by a definite one. This reminds us of the time when it was necessary to imprison a boy before he could be sent to a reformatory. The inconsistency, indeed, is even greater. The definite sentence is intended to deter. The indefinite sentence, to be passed at the same time and carried out immediately on the expiration of the definite one, is based on the assumption that the prisoner cannot be deterred. If we mean to protect the public against a particular offender's depredations by locking him up where he cannot commit them, the public is equally protected (as even Sir R. Anderson admits) whether his treatment be lenient or severe. The Bill now before the House can hardly claim the sanction of either Dr. Wilson or of the Salvation Army. If we conclude that a man cannot be deterred from committing crimes (and are determined not to make any attempt to reform him), we should confine him under the most lenient conditions that can be adopted without incurring unnecessary expense. But the general public does not seem to recognise the difference between the three available methods of dealing with the criminal, viz., rendering him afraid to offend, rendering him unable to offend, and rendering him unwilling to offend. The present Bill adopts both the former methods in succession and entirely neglects the last. But of what use is it to render a man afraid to offend as a preliminary to rendering him unable to offend? "Oh, but the fellow deserves it." This, even if true (which it often is not), is in my opinion no reason at all. Nothing can justify the infliction of pain, suffering or discomfort, on any citizen or even on "the stranger that is within our gates" except that the good of the public requires it. No criminal is an outlaw in the sense that any man he meets may kill him, beat him, rob him or imprison him with impunity: neither is he an outlaw in such a sense

that the State is justified in inflicting on him any punishment that it thinks fit without regard to any considerations either of justice or of mercy. We have no right to inflict on the very worst criminal more pain or suffering than the good of the public requires. But, I think, a perusal of Dr. Wilson's book will tend to moderate the indignation and desire of revenge which many people feel towards a man who has committed a heinous offence. We are too apt to conclude that every man is either sane or insane—responsible or irresponsible—though most of us are acquainted with persons whom we would find it difficult to place in either class. Long trials, as to whether a man was insane or not, have sometimes ended in a disagreement of the jury. We too often overlook the fact that there is a borderland, and that a man may be situated in this borderland through no fault of his own. This, I think, Dr. Wilson has shown. His criticisms on the legal view of insanity are, I think, quite justified. The fiction that the judges do not make the law but declare it has had the ill-consequence that what has once been declared to be the law is regarded as incapable of being altered except by Act of Parliament. The judges seem to me to be like a fat sheep which sometimes, if it gets on its back, cannot get up again, and will remain there till it dies unless some passer-by sets it on its legs. Every legal rule for which the authority of a statute cannot be cited should be regarded as capable of being altered by general rules or orders made by the majority of the judges and laid in due course before Parliament.

But though I think in this instance Dr. Wilson's remarks are well-founded, and that physicians know more about insanity than judges know or ever will know, I cannot concur in his observation made as early as page 4 (and there are others to the like effect further on), "When our rusty old law machine tumbles to pieces, crime and morality should be arranged in inverse proportion." I think we have



cleared away a good deal of the rust from the law machine and supplied it with newer and better machinery in many parts; and also that barristers and legislators are better able to decide what breaches of morality should be punishable as crimes, and in what cases the injured parties should be left to their civil remedies, than medical practitioners can be. *Ne sutor ultra crepidam*. Insanity is the province of the physician. But it is not for the physician to decide what acts ought to be punishable, or the contrary. The views of medical men, however, as regards an intermediate stage between complete insanity and perfect sanity are well worthy of consideration by all judges and magistrates whose duty it is to pass sentences on prisoners, and who are allowed a considerable discretion in passing them. And of course the physician has a right to point out the effects of particular punishments on both the body and the mind of the person who undergoes them. Dr. Wilson's book will be found well worthy of careful perusal.

LEX.

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#### IV.—CIVIL JUDICIAL STATISTICS, 1906.<sup>1</sup>

THESE statistics are edited by Sir John Macdonell with his usual ability, and any comments we have to make are of necessity largely prompted by his masterly introduction. The first thing that strikes one is the fact that the decline in the proceedings of the Courts of first instance continues, and that this is practically due to the diminution for the second year in succession in County Court proceedings.

As regards the English Appellate Courts, though there is a slight decrease in the number of proceedings begun, 1,176 against 1,218, yet there is an increase in the

<sup>1</sup> *Judicial Statistics, England and Wales, 1906.* Part II.—Civil Judicial Statistics. London: Wyman & Sons.

number of appeals, etc. heard and determined, namely, 996 to 914; but this increase is due to the considerably larger number of appeals from inferior Courts, which number 483 instead of 373, and are largely in excess of the annual average 1902—1906, which is 380. Taking the Appellate Courts, there is an increase in the proceedings begun in the Judicial Committee, which number 99. This number has only been surpassed in the last 20 years, by the figures in 1903 and in 1898. Some interesting Tables are given showing the nature of the business of the Judicial Committee recently. From them it will be seen that, although the number of appeals from India is as a whole stationary, yet it forms rather more than half of the total, being, in 1906, no less than 53 per cent. A noteworthy feature in some years has been the large proportion of reversals. In 1900, 1901 and 1904, it was over 40 per cent. The appeals from Canada show a slight tendency to increase, 1906 being a record year. Appeals from the Australian Courts show a tendency to diminish, the figures for 1906 being lower than those in any year during the last 10 years except 1899. In 1904 there were an exceptionally large number. It would seem as if the establishment of Australia's High Court had been the cause of this diminution. We may again call attention to the extraordinary number of reversals in 1902, it being no less than 81·82 per cent. Perhaps the encouragement given to appellants in that year may account for the large number of appeals in 1904. Since 1902 the proportion of reversals has diminished, and in 1906 was as low as 20 per cent. The appeals from the West Indies are hardly worth noticing, as there were only two, except to call attention to the curious fact that from 1827–32, when the population was about 800,000, the average annual appeals were over 14, and now the population is about 2,000,000.

In the House of Lords there was a considerable reduction

in the number of appeals set down and determined, and also in the number of days the House sat. The figures are 53 against 75, 45 against 75, and 70 against 96 respectively. The number of reversals here was 15 against 30, not so high as in 1905 when it was 33 to 38, but a good deal higher than the annual average which is 20 per cent.

In the Court of Appeal there is a slight decline, both in proceedings set down and matters heard; this seems attributable to the decline in appeals from interlocutory orders. The same sad tale continues as to business in the Chancery Division, only 475 actions were heard as against 609. There were only 14,359 summonses in Chambers; in 1887 there were 22,023. The decline in the business of the King's Bench Division continued; there was a decline in the number of writs issued both in the Central Office and by district Registrars; there was a decline in summonses and orders, in actions entered and tried, and in the total amount recovered. The learned Editor suggests that the last County Court Act has a growing effect in withdrawing from the High Court actions for sums between £50 and £100. This is based on the decrease in judgments in such actions in the King's Bench, and the increase of complaints over £50 in the County Courts.

Business in the Commercial Court and the Admiralty Court seems to have been a little better in 1906 than in 1905. The number of actions tried in the Commercial Court is 114, an advance of 7 on the year before, but a considerable falling off from 1900, when 205 were tried. Circuit work is as bad as ever. The returns from some of the smaller towns are somewhat pitilessly analysed, and their dreadful poverty of business pointed out. On no circuit has there been an increase, but on every circuit there has been a decrease except North Wales, which is stationary. That the number of actions is not a perfectly fair test of

the amount of actual work that is done is shown by the extract from a return given in a footnote which shows that, during the years 1905 and 1906, "the judges sat on circuit 395 more hours than if they had been sitting in London, notwithstanding the time spent in travelling, and the days or portion of days on which the business did not occupy the full time." There is also a statement of persons for trial on each circuit for the last 20 years, which shows a considerable diminution except in South Wales. On the Northern circuit the number in 1887 was 828, and in 1906 it was 767. It will, perhaps, be rather a surprise to many of our readers to note that, for 1904, 1905, and 1906, the South-eastern circuit has headed the list, dispossessing the North-eastern. The circuit towns, where the heaviest business is done, are as must be expected, Manchester and Liverpool. At those two towns, 136 and 124 actions were entered for trial respectively, and the amounts recovered were £26,426 and £36,057. The only other town where over 100 actions were entered was Leeds, where 106 actions were entered and £7,787 recovered. Birmingham comes next with 86 actions. At the other end of the list there was not a single action entered at either Bury St. Edmund's, Oakham, Devizes and Salisbury, Mold, Brecon and Presteign. If we look at the nature and results of the actions tried, we find under nearly every heading a substantial majority for the plaintiffs; but on marine policies, the defendants won in 7 cases against 4; in seduction, by 3 to 2; and in false imprisonment, by 7 to 6. Curiously enough, in a class of action very much akin to that of false imprisonment, namely, that of malicious prosecution, this last result was just reversed, as the plaintiffs were successful in 7 cases as against 6. In fraudulent representation cases the figures were just equal, 10 all. The cases in which, however, the defendants were most successful were those brought against professional men for negligence, as the defendants were triumphant

11 times, as against 6 when they were defeated. It may be interesting to mention that the amount recovered in breach of promise actions was £5,667, being slightly under the average, which was £6,953. The grand total for which judgments on money claims were entered was £5,593,635, or about £370,000 less than the year before.

The total amount of costs brought in to be taxed was £542,000, and allowed, £397,000. In this connection it is worth looking at those of the election petitions, a Table which necessarily does not appear every year. Those proceedings are very expensive, and the large proportion which is taxed off is remarkable. On the Maidstone petition the costs of the respondent brought in were £5,425, and the amount allowed £2,724, or almost exactly half. On the Worcester petition the petitioner's costs brought in were £4,686, of which £2,663 was allowed. On the Sheffield petition the respondent's costs brought in were £1,246, and the amount allowed, £636, or again almost exactly half. On the Bodmin petition the costs brought in by the petitioner amounted to the enormous sum of £9,278, of which £5,285 was allowed. In this instance the respondent's, which would of course usually be much lower than those of the petitioner, were brought in as only £1,621, but on taxation were reduced to £591, less than half. The grand totals of these proceedings, as regards costs, are £22,823 brought in, but reduced by taxation to £12,002.

Proceedings in bankruptcy seem stationary in most respects, but there is a large increase in the amount of creditors' proofs admitted for rating purposes, the amount being £1,123,717, as against £771,199 the year before. It also appears that the liabilities were nearly £200,000 larger and the assets about £350,000 smaller. The result therefore is that fewer persons were made bankrupt, but they failed for larger amounts and had less assets. Some inter-

esting facts appear from the Table of the amount of property admitted to probate, and amount paid for death duties. The total gross value of the estates was approximately £286,891,000, an increase of over £25,000,000 on the previous year, and the total net value £259,000,000 odd, as against £234,000,000. The payments for death duties were £16,500,000. In 1905 they were £14,879,000. The duty paid on realty was about one-fifth of the whole.

There is nothing particular to notice in the proceedings in the Divorce Court; the figures are almost exactly the same as the previous year. Decrees nisi for dissolution of marriage numbered 650; for judicial separation, 20; and for nullity of marriage, 24. The King's Proctor intervened in 27 cases and was successful in all. It again strikes one as a curious fact that the largest per-centage of proceedings should take place in the period when the duration of marriage has been 10 years and less than 20. As in 1905, in a large proportion of cases, there were no children of the marriage. We have once more to note with satisfaction the position of barristers as parties in this Court. It appears from the Table giving the husbands' occupation at the date of marriage, and which we suppose includes both petitioners and respondents, that in 1906 only one of those injured or guilty husbands was or had been a barrister. This is even an improvement on the year before when there were three. No Table is given of the occupations of the co-respondents, but we have little doubt that if there were one the profession would come out equally well. The solicitors do not do quite so well, as they number 10. It is impossible to draw any comparisons with other professions, even if it were desirable, without having the number of each.

The Official Referees disposed of 221 cases, and 109 were pending at the end of the year; the total amount recovered was £65,637. In 1905 they disposed of 258 cases, and the amount recovered was £120,435.

A question that interests everybody is that of the cost of our legal system. Here are a few figures. The total expenditure on the Court of Appeal and the High Court of Justice, in the year ending 31st March, 1907, was £649,396. The receipts were £499,863, leaving the net charge of the service £149,533. This is nearly £23,000 more than 1905-6, and it may perhaps be surprising that, as the amount of litigation seems steadily to diminish, there should yet be an increase in the costs of the Courts. However, this is mainly accounted for by two items: an increase of about £12,000 in the retiring annuities of judges, and £3,600 the expenses of Election Petition Trials. Although the net charge of service in Bankruptcy Proceedings and Companies' Winding Up is small, being only £5,343 and £4,217 respectively, yet it is a dismal falling off compared to the previous year, when there was actually an excess of receipts over expenditure of £4,479 and £1,098 respectively.

On turning to the statistics of the County Courts we find again a falling off in the amount of business transacted. This is the more noticeable as the business in those Courts had increased steadily up to and including 1904, when the total number of complaints was 1,397,000. In the next year, they sank to 1,358,000; and in 1906, again to 1,339,000. This, too, has taken place in spite of the extension of jurisdiction given by the last County Court Act, which was no doubt responsible for the substantial rise, in 1905, of the complaints above £50 to 3,599 as against 1,565 in 1904. In 1906, these dropped a little, namely, to 3,454. The proportion of the number of actions tried with a jury to those tried without is slightly larger, though it is still expressed by the same decimal '10; but this per-centage is scarcely fair, as in the number of cases determined without a jury are included judgments by consent, admission and default. Though the aggregate amount for which complaints were entered is nearly £37,000 less, yet the average amount per complaint, £3:1s., is slightly

higher and is the highest since 1895 when it was £3: 1s.: 2d. The aggregate amount recovered is the highest on record, £2,124,160. An unsatisfactory increase is that on warrants of commitment, which have risen from 147,059 to 153,146, and the debtors imprisoned, from 11,427 to 12,014; in the King's Bench Division of the High Court the number of Debtors imprisoned was 3. We cannot tell from the Tables the proportion of commitment orders to prisoners, but we can of complaints to prisoners. Birmingham which heads the list of business with 63,000 complaints, had 786 prisoners out of a population of 749,000, or a little more than one per thousand; while Rotherham, with 10,065 complaints and a population of 110,000, has 404 debtors imprisoned. It is impossible to account for the differences, particularly when they occur on different parts of the same circuit, and under what one would think were very similar conditions. For instance, Burslem, with 4,353 complaints, has 149 debtors imprisoned; while Stoke-upon-Trent, with 6,592 complaints, has only 36; and Hanley, with 5,933, only 50. Again, why should the two university towns differ so? Cambridge with its 4,197 complaints captured 64 prisoners, while Oxford had only 2,130 complaints and 3 captives. The present inquiry into the question may bring out some causes for these discrepancies and, we trust, some remedy. The most probable solution seems to be the abolishment of the power of committal. This it is suggested will cut down the system of credit. If this takes place we may expect to see a very marked shrinkage of County Court work.

The number of cases under the Workmen's Compensation Act continues to increase slightly, and there is a more substantial increase in the number of memoranda registered, but it must be borne in mind, that a record is preserved of a very small proportion of the number of cases settled by agreement or informal arbitration.

The learned Editor does not suggest any explanation for the almost universal decline in legal proceedings; apparently



it does not fluctuate with improvement of trade or the reverse, or good or bad harvests. If it does the connection has been too subtle for us to discover it.

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#### V.—RECENT DEVELOPMENTS IN THE SCOTTISH LAW OF SALE.

THE present writer, in an article in the *Scots Law Times* of 11th March, 1905, took occasion to criticise at some length the judgment of the First Division in the case of the *Electric Construction Company Limited v. Hurry & Young* ([1897], 24 R. 312). The case referred to related to the interpretation to be given to the Scottish part of section 11 of the Sale of Goods Act 1893, in these terms:—“In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.”—[Sect. 11 (2)]. The practical effect of the case referred to was, that the buyer having rejected goods, and thus claimed one of the alternative remedies provided by the statute, afterwards lost this remedy by permitting the seller to continue his efforts in the buyer's premises to render the machine (a dynamo) conform to contract. On subsequently claiming damages, on the footing of his retaining the machine in terms of the second alternative, it was held that, having adopted rejection as his remedy, and lost it through not insisting on the immediate removal of the machine, he had by the very act of rejection (ineffectual though it was) forfeited his right to damages, and was bound to pay the full price without deduction in respect of admitted defects.

The case of the *Electric Construction Company Limited* was followed in *Croom & Arthur v. Stewart & Company* ([1905], 7 F. 563), decided by the Second Division, but in the latter case, Lord Kyllachy, who gave the leading opinion, stated that while he held the *Electric Company's Case* a precedent by which the Court was bound, he could not quite follow the reasoning by which the majority of the Court reached the conclusion that the alternative remedy was barred.

The Second Division have now gone a step further. In *Aitken Campbell & Co. v. Boullen & Gatenby*, decided on 24th January last (45 S. L. R. 354), the circumstances were distinguished from those of the *Electric Construction Company's Case*, but a majority of the judges expressed the view that the latter case, which was strongly founded on in argument, is not to be relied on as an authority.

In reference to the cases of the *Electric Company* and *Croom & Arthur*, Lord Ardwall said:—"I may notice in passing that taking these two cases together the proposition" [involved] "as one of universal application was questioned in the first case, by Lords Kinnear and Low, and in the second, by Lord Kyllachy, and it is possible that in some other circumstances it may deserve reconsideration." The Lord Justice-Clerk said:—"The decision in that case" [*Electric Company*], "which seems somewhat doubtful as regards its soundness, has no bearing on this case." Lord Low, the only remaining member of the Second Division present at the judgment in *Aitkin & Co.'s Case*, was Lord Ordinary in the *Electric Company's Case*, and as such, gave effect to the alternative remedy of damages which was afterwards refused by the First Division on appeal. It therefore seems that, constituted as the Second Division now is, the *Electric Company's Case*, even if not capable of being distinguished, would have been ignored as an authority without the necessity of an appeal to the

House of Lords. In this connection it is at least open to argument that the principle involved in the *Electric Company's Case* has been already negatived by the House of Lords, in the Scotch appeal *Paton & Sons v. Payne & Co.* ([1897], 35 S. L. R. 112).

The actual ground of judgment in *Aitken Campbell & Co. v. Boulton and Gatenby* (cit. *sup.*), involves another and very important branch of the law of sale. A firm bought 133 pieces of maroon twills by sample and paid for them. Subsequently, on making a full examination, they found that 64 pieces were not conform to contract in respect that they were "softer" than the sample. The buyers intimated their acceptance of the balance of the goods and their rejection of the 64 pieces, and returned the latter to the sellers who refused to accept re-delivery. The action was raised by the buyers against the sellers for repayment of the price paid for the defective pieces, or alternatively, in the event of their being held bound to accept the whole goods, for damages in respect of the defective quality of the portion objected to. The Court held that the goods were delivered under one contract of sale, and therefore, that sect. 30 (3) of the Sale of Goods Act did not apply. The attempted partial rejection was invalid, but on the other hand, the sellers had not been prejudiced by the attempt, and therefore, the buyers were not barred from now retaining the goods and claiming damages.

This decision involves a distinction between the *kind* of goods and the *quality* of goods. Much difficulty has been experienced in England, and conflicting judgments have been given in this connection. The distinction has an important bearing upon any attempt to classify "conditions" and "warranties" according to the English division of the contract of sale; but in Scotland, where every warranty is a condition, the subject has not hitherto been much canvassed, and the application of the English decisions is

therefore of special interest. The result in the case now under notice has been to declare that "soft maroon twills" differ from other "maroon twills" only in quality and not in kind. The one is not a different *description* of article from the other, the adjective "soft" merely indicating a standard of quality applicable to the same *genus*. It is not easy, however, to reconcile this result with many English decisions. In 1815 Lord Ellenborough declared that "waste silk" differed in kind and not merely in quality from other silk (*Gardiner v. Gray*, 4 Camp. 144). In like manner "Calcutta" linseed has been held to differ in kind from other linseed (*Wieler v. Schilizzi*, [1856], 17 C. B. 619) and "Salem" cotton from other cotton (*Azémar v. Casella*, L. R. [1866], 2 C. P. 677). In regard to the separation between sale and vendor's warranty, Lord Abinger in 1838 used some familiar illustrations. "If," he said, "a man offers to buy peas of another and he send him beans, he does not perform his contract; but that is not a warranty . . . . So if a man were to order copper for sheathing ships—that is a particular copper prepared in a particular manner; if the seller send him a different sort it is not properly a warranty" (*Chanter v. Hopkins*, 4 M. & W., at pp. 390, 404). We can appreciate the distinction in kind between peas and beans, but the different shades of copper sheathing seem to refer rather to quality than kind. Yet this very distinction in the quality of copper-sheathing led to two conflicting decisions (Cf. *Gray v. Cox*, [1825], 4 B. & C. 108, and *Jones v. Bright*, [1829], 5 Bing. 533). The general term copper-sheathing covers the genus, and the species may be indicated by any qualifying adjective such as "good," "serviceable," "sound," "fit," or, "fit-for-a-ship" copper-sheathing. Similar adjectives might be multiplied to any extent and turned into descriptions which would convert a warranty into a condition. In the case regarding "waste-silk" already referred to, Lord Ellenborough said: "The

purchaser has a right to expect a saleable article answering the description in the contract" (*Gardiner v. Gray*, [1815], 4 Camp. 144, at p. 145). Commenting on this in *Randall v. Newson* (2 Q. B. D. 102), Brett, J., said: "The decision is, that the commodity offered and delivered must answer the description of it and be *saleable waste silk*." On the same principle, to use the facts of *Randall v. Newson*, a carriage-pole becomes a "reasonably-fit-and-proper carriage-pole."

A reflex of the difficulty referred to has no doubt appeared in Scotland, as in the case of *Jaffe v. Ritchie* ([1860], 23 D. 242), where a seller of yarns, described as flax yarns, was held to be in breach of the whole contract, because a portion of the delivery contained some jute along with the flax. Though relating to quality, the Court followed the English decisions and based their judgment upon description. But at the time when this decision was given, the distinction between condition and warranty did not exist in Scotland, and therefore the development of English law, to which reference has been made, introduced no change. Even now, under the Sale of Goods Act, warranty in the English sense only presents itself as an option in favour of the buyer. The seller is bound to submit to total rejection of the goods and to rescission of the contract if he fail to implement the contract in any material part. A defect in quality may be quite as material to the buyer as a difference in the kind of goods furnished, and therefore under this branch of the Code, the English form of the distinction does not acquire any increased importance.

In another aspect of the law of sale as now codified, the English distinction between the quality and the kind of goods offered by the seller forms a valuable analogy. Sub-section 30 (3) of the Sale of Goods Act provides that: "Where the seller delivers to the buyer the goods he contracted to sell, mixed with goods of a different description not included in the contract, the buyer may accept the

goods which are in accordance with the contract and reject the rest, or he may reject the whole." The judgment in *Aitken & Co.'s Case* (*cit. sup.*) turned upon the interpretation to be given to this sub-section, and particularly to the meaning to be attached to the word "description." It is to be noted that the Court took the word in its natural sense as denoting a difference in kind and not merely a difference in quality. But even upon this foundation, if the judges had followed Lord Ellenborough and Lord Abinger, they might easily have made "soft maroon twills" an article of a different description from "maroon twills," and therefore capable of being separated from the rest of the consignment and returned to the seller. In the words of Lord Low: "The goods contracted for were 'maroon twills,' and the goods delivered were 'maroon twills,' but 64 out of 133 pieces were not of such good quality as the samples." In these circumstances the *partial* rejection attempted by the buyers failed, but such failure did not affect their alternative right to retain the whole goods and recover damages in respect of the defective quality of the part affected.

RICHARD BROWN.

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## VI.—THE PROBATION OF OFFENDERS ACT 1907:<sup>1</sup> AN APPRECIATION AND A CRITICISM.

**A**N attempted appreciation of an Act that only came into force on the 1st of January last may well seem premature, and a criticism of it unseasonable. However, even as early as this, it is possible to form a decided opinion about certain features of the Act. The materials are to be found in the Act itself, the Home Secretary's memorandum of advice to the magistrates, and his first set of

<sup>1</sup> 7 Edw. VII, c. 17.

rules issued in accordance with the Act, and in that fund of experience accumulated under similar legislation in America. In default of English experience, we can supply to some extent our temporary embarrassment from the resources of our relations; though it is to be remembered that Probation is not wholly without a history on this side of the Atlantic.

If it is possible to form a decided opinion, it is surely well to hasten to express it. The wise of to-day bear in mind continually the parable of the unjust judge and the importunate widow, knowing that principalities and powers attend humbly upon those, and none but those, who know their own minds and proclaim their wants insistently.

The Legislature has not satisfied the demand for Probation by a perfect measure, and it must not be allowed to think so; but the Act does mark a very large advance in the right direction. It is the chief purpose of this article to show in what that advance consists, and an incidental purpose to point out what are conceived to be deficiencies and to smite them friendly and reprove them.

It is proposed to deal with the Act only as it touches the police courts. The other criminal courts are equally within the scope of the Act; but the Act does not materially differentiate them, and it is the police courts that are primarily affected.

The general province of the Act is outlined in its first section:

“Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or other than a nominal punish-

ment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—

- (1) Dismissing the information or charge; or
- (2) Discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

Observe in the first place the permissive character of the section; the Act will only be operative in the exercise of the discretion of the justices.

Observe, secondly, that the section embraces all kinds of offenders: it applies to men and women as well as to children; and it is not confined in its action to any particularly favoured class, such as first offenders. Here again, the Act offers a wide field for the discretion of the justices, permitting them to apply a lenient alternative for punishment wherever they can find a reasonable excuse and use for it.

So far the Act makes no striking departure in the probational direction. It is, indeed, largely a reproduction of other enactments which are repealed by it; and the idea of Probation is not in itself new to the laws of England. Earlier legislation has formally blessed it, and pretended itself to test the offender, by allowing him a *locus penitentiae* and withholding punishment from him, until it could be seen whether he was ready to earn its remission by good conduct.

Ever since the Summary Jurisdiction Act 1879 came into force, police courts have been empowered in "trivial" cases to release a convicted offender, without punishing him, upon his entering into a recognizance "to appear for sentence when called upon, or to be of good behaviour." But what



was in words merely a time of grace, has in practice involved exemption from punishment even for the impenitent. It has not been usual to call up anyone for judgment, unless in the meantime he has been discovered in another actual breach of the Criminal law; and the undertaking to be of good behaviour has been construed as leniently. And when a fresh offence has been committed and the offender a second time convicted, magistrates have not been sufficiently careful to make the punishment cumulative, or at least to make it clear to the offender himself that they were punishing the two offences together. Above all, the Summary Jurisdiction Act of 1879 provided no machinery which might help the magistrates to keep in touch with an offender during the period of his recognizance, and so learn whether or not he was amending his courses.

The Probation of First Offenders Act 1887, in spite of its title, carried Probation very little further. It applied to first offenders only: but in their cases it empowered the magistrates, on conviction, to substitute recognizances for punishment on account of mitigating circumstances, similar to those specified in the present Act, other than the mere triviality of the offence; and it was not confined in its exercise to the police courts.

It spoke, indeed, expressly of releasing an offender "on probation of good conduct"; but even so, it fortified itself against the abuse of its clemency with no other bulwark than a recognizance "to appear and receive judgment when called upon, *and* in the meantime to keep the peace and be of good behaviour."

So far as the police courts are concerned, it would be hardly unfair to say that the change effected by the Probation of First Offenders Act was the change of an "or" into an "and" in recognizances, by which they were rendered more long-winded and no more efficacious. For mitigating circumstances surely tend to make an offence

"trivial"; and the result appears to be exactly the same whether the offender be bound over to come up for judgment when called upon and/or to be of good behaviour. The insertion of a clause about keeping the peace would rather seem to weaken the recognizance, as definitely indicating that clemency is to be forfeited only by the commission of a fresh offence.

However, even before the Act of 1907, a real if imperfect probational system had been evolved in this way. Magistrates are not obliged to decide the fate of an offender on the first occasion on which he appears before them. They may remand the offender in custody from week to week, or adjourn the case for a longer period, when the offender is allowed to return to his home; and in the meantime cause inquiries to be made through the police or otherwise. The establishment in London of remand homes for children, and the presence in the police courts of such philanthropic agents as police court missionaries, and officers of the N.S.P.C.C., has much facilitated inquiries, especially in children's cases. A remand or adjournment, of course, is only available before the decision of the case, and is primarily a method whereby the magistrates can postpone their decision, until they have satisfied themselves of the guilt or innocence of the offender. But the magistrates can and do use the remand or adjournment to gain time and an opportunity to consider with the missionaries and their other allies what is to be done with the offender after conviction. Meantime sentence is in the air, and the offender, whether he be in custody in a remand home or prison, or out of custody and merely subject to the visits and advice of the missionary in his own home, has a lively sense of his precarious position. He is not unlikely to discover a genuine contrition, and may even be induced to make some reparation for the injury he has inflicted in earnest thereof.

Such remands and adjournments do not, as a rule, last for

more than one or two weeks; but for children's cases the magistrates of one London court, at least, and the Birmingham magistrates made a free use of adjournments for as long a period as three months—after satisfying themselves of the commission of the offence charged—with excellent results. The adjournment might be accompanied by the threat of a whipping on the receipt of a bad report of the offender's conduct during the interval. The offender returned to his home and the court provided for his supervision there. The London magistrates used the missionary for this purpose, the Birmingham magistrates used members of the police force, specially detached for this particular service and called "Probation Officers." In either case the plan kept the magistrates pretty well informed of the offender's behaviour, and seldom failed to keep the offender on his good behaviour for the three months of the adjournment; though that period is all too short for a full test. In America probation usually lasts for six months and not uncommonly for a year.

There is this to be noticed in the method practised in London and Birmingham: if the reports on the offender made by the court's emissaries were favourable to him, there was no conviction. At the end of the period of adjournment the magistrates simply discharged the offender whom they did not punish; they might even dispense with his reappearance in court for the purpose of being discharged.

Here the Act of 1907 seems to have borrowed a hint: "The court may, *without proceeding to conviction*, make an order, &c.": indeed it would appear that the magistrates cannot "convict" any offender, whom they propose to submit to probation, even if they would. The offence is proved: a probation order is to be made, under which the offenders will be subjected to a disciplinary treatment; but there is to be no "conviction." Is this anything more than a sop to sentimentality?

The Larceny Act 1861, s. 108, seems to have set the precedent, permitting a magistrate to "discharge an offender from his conviction" on the payment of damages and costs. The Summary Jurisdiction Act 1879, followed suit, allowing the court "without proceeding to conviction" to dismiss the case and to order at the same time, if it thought fit, the payment of damages and costs. It is not logical to mulct a man in damages on a criminal proceeding without convicting him; it is still less logical to subject him to correction without convicting him. Even under the Act of 1879 a recognizance to appear for judgment when called upon was only taken after proceeding to a conviction.

This Act ordains, not only that magistrates may exact damages and costs, though there has been no conviction, but even that under a probation order an offender shall enter into a recognizance to appear for *conviction* and sentence when called on. And yet, presumably, no probation order will be made at all, until an offence has been proved.

A conviction means properly the proof of an offence and nothing else; and the abuse of language sanctified by the Act culminates in the absurdity of sub-section (4) of the 1st section, which enacts that a probation order shall, "for the purpose of revesting or restoring stolen property, and of enabling the court to make orders as to the restitution or delivery of property to the owner . . . *have the like effect as a conviction.*" Indeed a probation order in the eyes of everyone will be very like a conviction.

And all this circumlocution is so gratuitous; it would have been easy and unobjectionable to have taken away by a single clause after the model of the Youthful Offenders Act 1901, all such slight legal disabilities as *ipso facto* attach to a conviction. No doubt, underlying this prevarication, there is a generous impulse to distinguish between the fully and partially responsible. But such merely verbal

distinctions are as dangerous and disingenuous here as the theological doctrine of re-interpretation elsewhere.

It would probably be a wise thing to presume generally that children are only responsible for the offences they commit in a minor degree, and so to treat their cases separately in a special kind of court and on special principles. Such children would not be convicted in the ordinary sense; for they would be, as it were, no longer "under the law"; and the language of the old dispensation would not naturally apply to their cases. That would be a wholly diverse thing from anything attempted by this Act, which pretends merely to introduce an improved machinery into the ordinary law.

This true terminological inexactitude is no doubt imported in deference to those persons who think that a conviction brands the offender with an indelible stigma, whatever be the moral quality of the offence. And yet even the lowest of the low distinguish crimes by their moral qualities, and in assessing a man, pay scant regard to the question whether he has been convicted or not.

In these bye-law ridden days a criminal conviction is not necessarily even disgraceful; and, on the other hand, it is to be hoped that a disgraceful action will still brand a man, whether he be convicted for it or not. It is beneath the dignity of the Legislature to go a-tilting with bugbears of this description.

Perhaps the point has been over-laboured, and in itself no doubt the incident is slight; but it is symptomatic of a mawkish trend of thought, that looks over-nicely to the outside of the cup and the platter, and is careless of the contents. Verbiage is only too capable of obscuring principles, and the echo of a seductive phrase is only too apt to delude the well-meaning man and frustrate the realisation of some valuable end. It really matters little whether the child is convicted or not; it matters much whether he is taken to a police station or not.

The first section of the Act also fixes three years as the maximum period of probation. From the Home Secretary's memorandum it appears that he anticipates "that the ordinary term of probation will be six months, and that orders for more than a year will be rare and exceptional." American experience and our own would confirm the Home Secretary's prognostication, and it may be assumed that six months would often suffice; but where the case has halted somewhat between success and failure in its initial stages, a longer period of supervision might prove of great advantage.

But there is this difficulty. Though the court can under sect. 5 vary the conditions of or wholly discharge the recognizance before the full period fixed in the probation order has expired, if warranted by the good conduct of the offender, it is by no means clear that it can extend the term of probation when it has once been fixed, however advisable that may be. In the circumstances, it would seem a wise course for the magistrates to specify at least a year as the period of probation in the first instance, and to exercise freely the power to discharge the recognizance after six months of good conduct. The London magistrates, at any rate, appear to have adopted a year as the ordinary period in making a probation order.

So far the Act has done nothing more for probation than to provide for the taking of recognizances in much the same fashion as earlier legislation; but by sects. 2 and 3 the Act makes a great new departure.

Sect. 2 authorises the court to have a condition inserted in the recognizance "that the offender be under the supervision of such person as may be named in the order during the period specified in the order"; and it is the insertion of such a condition that constitutes a probation order. The court may also insert subsidiary conditions for securing such supervision, for keeping the offender away from evil

associates, and from drink, where the offence was committed under the influence of drink, and generally for safeguarding the offender in an honest life.

The court has a free hand; it is not obliged to insert any such conditions in the recognizances taken under sect. 1, but if it does decide to insert the condition for the supervision of the offender, it can, in its discretion, frame additional conditions to be observed by the probationer. So *exempli gratia* in a London case, where a girl had been largely led into crime through her love for frequenting music halls, the magistrate made abstention from music halls a condition of her recognizance.

Sect. 3 arranges for the supply and remuneration of the persons who are to take supervision of the offenders under sect. 2, *i. e.*, the probation officers. The appointment of these probation officers, except in the metropolitan police court district, lies either (*a*) with the justices acting for a petty sessional division, or (*b*) the justices of a borough; and the scale of their remuneration is to be fixed (*a*) in counties by the Standing Joint Committee, (*b*) in boroughs by the Town Council.

This clause, too, is very elastic. On the one hand the justices need not appoint probation officers at all, and even if the justices appoint them, the Town Council or Standing Joint Committee need make no provision for their remuneration: moreover, the person named in the probation order need not be a formally appointed probation officer at all; anyone may be appointed to look after a particular case.

Permissive as these sections are, they are the keystone of the Act, and it is through them that this country at last obtains a thorough Probation system. Nevertheless, the change is evolutionary rather than revolutionary. For many years past there has been at work in the police courts a body of missionaries who have been anticipating

to a large extent the advent of the probation officers. To the C. E. T. S. is due the credit of having inaugurated this kind of social service; and the C. E. T. S. has gradually, and of late years rapidly extended this branch of its work, until, according to its report for the year 1906, it has 110 missionaries and 19 mission women visiting at 327 courts in England and Wales. And the C. E. T. S., though the chief, is not the only society engaged in this work.

In the metropolitan police court district the appointments of probation officers are in the hands of the Home Secretary himself, and there, according to his memorandum, "it will, he believes, be possible to obtain the services of a sufficient number of persons who have already had a considerable experience of the kind of work that will fall on the probation officers, and whose qualifications have been already tested by the services they have rendered to various philanthropic societies." Foremost among these are the police court missionaries; and no doubt the example of the Home Secretary in appointing them probation officers is being followed everywhere.

Formerly the missionary's independence of the magistrates was his weakness. The C. E. T. S. was his paymaster; and the magistrates were tempted to ignore one whom the law did not sanction, and whom they could not themselves wholly control. This feeling has been more prevalent in the country than in London and the large towns, where missionaries and magistrates are thrown more together over their common work, and the shadow of the C. E. T. S. is not so sensibly imminent. But even in London itself the relations between the C. E. T. S. and the magistrates have not invariably been harmonious, and one London court has for some time past possessed its own missionary at a salary found for him by the magistrates of that court, because when the missionary had to choose between the C. E. T. S. and the magistrates, he chose the service of the latter.



So even before the Act, in one court at least the missionary had become an official of the court, a probation officer in the chrysalis. But the probation officer is something more than the missionary could ever be. He has now a definite *locus standi* at law, and is invested with the dignity and authority that such a position could alone give him: while so far as he is a public official remunerated by the public, he is *pro tanto* freed from the control of his own society. The missionary, to do him and his society justice, had already risen above his origin. He was not very much concerned with the peculiar interests of his own society: he was ready to co-operate with any bench of justices who would put confidence in him, and his chief and most valuable function was to carry out in an informal manner those very duties which have been formally assigned to him by sect. 4 of the Act. These duties are to visit and receive reports from any person under supervision, to report to the court as to his behaviour, to see that he observes the recognizance, to advise, assist, and befriend him, and when necessary to endeavour to find him suitable employment. How far the missionaries have already succeeded in carrying out these duties may be gathered from the brief summary of their activities given in the Report of the C. E. T. S. for 1906, from which the following extracts are taken :—

Visits to cases at their own homes . . .	80,365
Cases attended to by Magistrates' request . . .	7,565
Visits from cases to missionaries . . .	32,080
Persons placed in homes or restored to parents and friends . . . . .	5,313
Employment provided, either temporary or permanent . . . . .	5,261
Cases assisted with money, shelter, food, clothing, tools or stock-in-trade . . .	19,838
Loss of employment averted through intervention of missionary . . . . .	762

And in addition the society runs 8 homes or labour yards, affording temporary relief for men, and 2 shelter homes for lads.

Henceforth the probation officer will be in a stronger position to control the offenders, without necessarily losing the offenders' respectful appreciation of his friendship. His name will be in the probation order, his power over the destinies of the probationer will be evident, and his words of remonstrance or encouragement will therefore carry additional weight. At the same time the missionary will so far remember his past, that he will continue to perform, besides his strictly probation work, those other good offices of a general nature which made him so invaluable in the police court before the era of the Act.

It is noticeable that, under the Act, the authority to create is not the same as the authority to pay the probation officer. Here America does not help us much: for the various States appoint and pay their probation officers in a variety of ways. The English tendency is no doubt to keep anything appertaining to the administration of justice as much as possible in the hands of the courts; and it is difficult to quarrel with an arrangement which is calculated to obviate friction and secure the prospects of the Act at the outset. But the conduct of probation is more properly a civic than a judicial duty; and if the probation officers were appointed by town and county councils, the appointment and payment could be in the same hands, and there would be a greater opportunity of linking up their police court work with other charitable agencies.

The Act seems to make no adequate provision for the employment of volunteer probation officers, or at least for the combination of volunteer and paid officers, which is an important feature of the best probation work in America. The merit of the volunteer is that he can centre his attention

upon one or two cases ; and though by virtue of his office he has an authoritative position, he is naturally less professional and more congenial than the paid officer. A staff of carefully selected volunteers, with a paid officer over them, to guide, teach and organise them, might do very much towards a successful working of the Act.

The Home Secretary, it is true, in his memorandum says, "that from offers he has received the Secretary of State is inclined to think that much valuable assistance in carrying out the Act will be given in London by volunteers," and powers are given by the Act both to appoint them and to pay their out-of-pocket expenses ; but it is doubtful whether much scope will be given them.

Under the Act only one person can be named in the probation order to take supervision of the offender. The tendency will naturally be to insert the name of the paid probation officer : and a volunteer assisting him, even though an appointed probation officer of the court, will have no *locus standi* in the individual case. If volunteers are to be encouraged, they must be given an independency in their own right : their position, if it is not to be one of emolument, must be one of dignity. The volunteer will not be willing to occupy the dubious position held by the missionary before the Act ; and if the paid probation officer is to be a transformed missionary, with all his other good qualities, he will carry into his new state a certain jealous love of cases, engendered by a long course of report writing, which regards with suspicion outside intervention of any kind. Such a paid probation officer will neither desire nor be able, like the parson, to gather round him a host of assistants working under and for him.

Yet there seems to be no good reason why the volunteer should not be freely employed under the Act as it stands. Nothing prevents the magistrates from naming some volunteer in the probation order as the person to take supervision.

Then, if the professional probation officer receives a salary, the volunteer would have a right to demand his assistance on all occasions, and if he is paid by the case—for the remuneration of the paid probation officer may be assessed in either way—it would appear from the Act that he can be paid for “acting under a Probation order,” even though he is not expressly named in the order. Then the responsibility for the particular case would fall primarily on the volunteer; the professional would only bear a general responsibility for the proper working of his department. At the same time he would be able to control the volunteer; because on his representations the magistrates could substitute, as they have full power to do under the Act, for an incompetent volunteer either another volunteer or the professional himself. Of course, if a choice had to be made between the paid officer or the volunteer, one would unhesitatingly prefer the former; but a judicious combination of the two is likely to give better results than the exclusive employment of either kind. It is a pity that the Act has not more elaborately provided for the use of volunteers. As the Act stands, the line of least resistance will unfortunately lead the magistrates to the use of paid probation officers only; and it remains to be seen whether they are capable of resisting the temptation.

The permissive character of the Act affords no substantial ground of complaint. “Good wine needs no bush,” and the merits of the probation system do not lie deep. Now that men have grown accustomed to perceive in crime the needs of the offender more readily than the heinousness of the offence—and it is the missionary who has been foremost to hold the glasses to their eyes—they are prepared to welcome probation in England. Without public opinion the Act, however compulsory, would effect little or nothing; with public opinion the Act, however permissive, is sure to succeed. It is doubtful whether any authority will be found

only so recalcitrant as to refuse to provide remuneration for professional probation officers.

Fortunately, no express sanction is given by the Act to the appointment of police officers as probation officers: there must be no suggestion of any degree of affinity between "police supervision" and the friendly supervision intended by the Act. The Home Secretary is somewhat tentative in his advice upon the point. "He is of opinion that the influence for good that such persons (*i.e.*, C.E.T.S. missionaries, N.S.P.C.C. agents, &c.) will be able to exert on 'probationers' is likely, on the whole, to be stronger than any influence that can be exerted by persons officially connected with the police. If, in default of probation officers of this description, the justices should decide to appoint police officers, great care will be necessary in making a selection, and police officers so appointed should not wear uniform in the discharge of their duties under the Act."

Here there is no doubt a covert reference to Birmingham, where there were three police probation officers in existence prior to the Act. One would not disparage in any way the good work done by these men; but it must be remembered that though it may be a good thing to convert a policeman into a probation officer, where otherwise there would be no probation officer, it does not follow that the policeman makes the best probation officer; and in any case it would be rash to found a system upon the success of men of perhaps exceptional calibre. Chicago, too, has tried policemen as probation officers, and it seems to be agreed that they are not a success in that capacity, however useful they may be in assisting other probation officers. The policeman will always tend to adopt the rôle of the prosecutor—which is alien to the right conception of a probation officer—and must inevitably suggest the strong arm of the law, the sword of Justice not her balances, to the probationer whom he is trying to befriend. Dress him in mufti

as much as you like, what will you make of him but a plain clothes constable? In low circles the plain clothes man incurs the odium that attaches to the spy. Let the cobbler stick to his last: *pace* the late Sir H. Vincent, the common use of policemen as probation officers would seriously endanger the beneficence of the Act.

There is this regrettable clause in the Act:—

“There shall be appointed, where circumstances permit, special probation officers, to be called children’s probation officers, who shall, in the absence of any reasons to the contrary, be named in a probation order made in the case of an offender under the age of sixteen.”

The clause is an afterthought; it did not appear in the original Bill; and it is incongruous with the general breadth of the Act. It is the tone of the clause that is at fault; it purports to be directory, though the unfettered discretion of the magistrates, even on the much more vital question of the employment of policemen as probation officers, is the salient feature of the whole Act. The Home Secretary, commenting upon the clause, “considers that female probation officers should be appointed for boys and girls of school age, as well as for women and girls over 16.” There is plenty of scope for the employment of women as probation officers under the general provisions of the Act; there is no doubt that women will contribute largely to the success of the Act. But how absurd it is to give imperative instructions for the employment of either women or men in certain classes of cases! Cases cannot be classified for this purpose; a great deal depends upon the needs of the particular supervisee and the powers of the particular supervisor; and here, if anywhere, the magistrates should exercise the completest discretion. A man may well be a more effective probation officer than a woman in the case of a woman or girl offender

and certainly in the case of a schoolboy; and occasionally a woman might be more effective than a man in dealing with a youth or a man. There is a nasty smack of bigoted philanthropy in the clause which is positively vicious, if it is not idle; it is only of value as illustrating how impulsively our laws are patched together. However, in all probability, circumstances will *not* often permit this creation of special probation officers. In *Stone's Justices' Manual* it is suggested that there is no reason why ordinary probation officers should not be appointed special probation officers also. This seems hardly in keeping with the spirit of the clause, but in the circumstances a beneficial interpretation of it.

But who minds the spots on the face of the sun? The Act creates a living public Probation System, and so puts into the hands of the magistrates a most potent instrument for good. The object of the Act is still the proper object of all Criminal law, viz., the protection of society from the lawlessness of the anti-social: but following up the line of modern penological thought, the Act fixes its gaze upon the offender and not the offence, and aspires to secure society by reforming rather than by deterring; and this reformation it undertakes to conduct in the offender's own home.

Serious crime and hardened criminals are not within the purview of the Act; they may be reformed under the Borstal system or similar methods, but they are not subjects for home treatment: nor are children who either have no home or no home worthy of the name; they must still pass into institutions and away from their old surroundings before there is hope of them. But to the *ἀκραιῶς*, the weaklings of crime, described by its first section, the Act will be a very present help in trouble. Many of these weaklings, before the Act, went yearly slipping down to swell the number of the habitual criminals. For them the Act has devised an excellent "non-skid" in the supervision of an official friend,

as an official to be respected, as a friend helpful and kindly, ready to listen to little difficulties, eager to advise and encourage. The official friend will watch over, not spy upon the offender, who will be sensible of a moral discipline that is as good for him as new to him, saving him from himself.

The Legislature has done well to give the probation officer a public position and remunerate him from public funds. It is not right that such an officer should be merely the agent of a particular society; the office is too important: and it is not to be expected that magistrates will often have at their disposal the services of a capable, unpaid man or woman ready and willing to conduct the necessary administrative and routine work connected with a number of probationers. However many volunteers come forward, the paid probation officer will be invaluable to co-ordinate, and superintend, and to prevent charitable idiosyncrasies from running amuck among the probationers.

The law gives here an opportunity for the creation of a sound Probation system; it only remains for the law-loving justices of the peace to make good use of their privilege.

HUGH R. P. GAMON.

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## VII.—PROFESSOR WESTLAKE ON WAR.

AS a railway company which (if for that reason alone) deserves to be called enterprising informs us—"There are spots on the sun." We shall therefore make no apology for calling attention to some positions taken up by Professor Westlake in his recent book,<sup>1</sup> which seem in need of serious scrutiny before they can be unreservedly admitted as part of the Law of Nations. Particularly, where (as is frequently the case) these positions are currently held by a considerable

<sup>1</sup> *International Law, Part II, War.* Cambridge: The University Press. 1907.



number of other modern authors, does it seem desirable that they should not remain unquestioned.

In what follows, it is assumed as the basis of argument, that in matters of International law, as of other law, "*stare super antiquas vias*" is a good maxim. Certainty is better than hyper-sensitive adjustment. Certainty is very difficult to attain where the appeal is to the general conscience. It is impossible to attain it, if rules which are fairly well established are continually being questioned. It is the part of the scientific publicist to be a consolidator; not a sceptic.

That is not to say that International law is unprogressive, unchangeable. Only it must be recognised that its change must conform accurately to the rising or falling tides of the instructed public conscience.

It is useless and dangerous to assert that the law has changed unless you can point beyond mistake to a definite change in the attitude of general opinion. From that it derives its force: to that master it stands or falls. And in proportion as general public opinion is disturbed and confused as to what the rules of International law on a given topic really are, in that measure is International law weakened and rendered of none effect. The attitude of the civilised world towards such problems may change. But it must change slowly, and in accordance with a natural evolution corresponding to the general mental outlook. When we can assert that the universal conscience has taken a step in advance, we may say that the Law of Nations has changed. But, short of obtaining that momentous proof, we are not entitled to assume that it has. If we do assume it, we disturb the foundations of all law. We bring the restless ocean from the edge of Achilles' shield to the centre.

Having thus indicated the point from which we propose to approach the problems raised in the book before us, we may proceed to consider them in detail. In the first

place, the remark may be made that there is about Dr. Westlake's invaluable work a certain subjectivity (if it may be so styled), which leads him to lay an amount of stress upon mental attitudes and the actual (and inscrutable) intentions of parties, which is occasionally productive of strange results. When, for example, Grotius tells us that war is a state (*status*) and not an event (*actio*), he merely means us to guard against the supposition that any such forcible acts as battles or skirmishes are necessary to constitute a true war. Cicero says that war is a contest by open force. Grotius reminds us that actual force need not have been exercised. But Professor Westlake goes beyond this, and infers that, as forcible acts are not necessary, so they are not sufficient. There must also, he says, be the intent to make war, on the part of at least one party. What does this reduce our definition to? "*War*," we are told, "*is the state or condition of governments contending by force.*" It must be set up with the intent to make war: therefore "*War is a state or condition of governments contending by force, with the will to make war,*"—which approximates to the standard definition of archidiaconal functions. If the substitution is made of the words "*with the will to so contend,*" we restore the definition to coherence (if not to usefulness): but it is no longer Professor Westlake's. For he states that no acts of unlawful violence are, in themselves, war; and he expressly instances the seizure by Russia of Bessarabia "*as a material guarantee.*" Would anyone, not an international lawyer, think that one country can forcibly invade the territories of another, occupy its cities, and expel its garrisons, without being at war with it? Would it on the other hand enter into the mind of anybody to conceive that Russia, in such a case, was not intending to "*contend*" with Turkey "*by force*"? When Louis XIV invaded the Palatinate, "*sans que la paix soit rompue de notre part,*" no such

hypocritical expressions of intention to keep the peace could be supposed to outweigh the obvious fact that he was breaking it.

*This heresy, which perhaps may be styled the Ludovican* (and which has gained much support of late years),<sup>1</sup> of admitting that so long as a State disclaims the idea of going to war it may do what it likes without being at war, unless and until the worm on which it has trodden turns, is particularly dangerous. It is unjust to the assailant:—for it brands as brutal violence what should have been lawful war. It is unjust to the assailed:—for it gives the assailant all the advantages of neutrality and all the benefits of belligerency. It is unjust to the neutral:—for it throws on him the impossible duty of examining the real intentions of his neighbours. Is it replied that the assailed State can declare war, or by open resistance begin it? It can, if it prefers annihilation to the infliction of indefinite damage. What is such a privilege worth? An astute assailant will always trade on the unlikelihood of its being used. There is no need, and there is grave danger in trying, to amend the definition of Grotius by a reference to the special aims of the assailant. The plain fact that he is interfering with his neighbour's territory, and avowedly prepared to overcome any resistance by force of arms, constitutes the *status per vim certantium*, however little he wishes or supposes that actual physical conflict will be the outcome. The untenable nature of the other theory can be seen at a glance in the citation of a single example. It is puerile that the ships of one nation should be refused asylum in the ports of a neutral because they are engaged in a war, the result of which may be the cession of a canton, whilst the ships of another are freely admitted on their errand of "pacifically" occupying the littoral of a whole province!

<sup>1</sup> Cf. *L. M. & R.*, Feb. 1899, p. 227; Aug. 1899, p. 436.

## One is irresistibly reminded of Mr. Dooley:—

"Th' dillygate fr'm Chiny arose, an' says he: 'I'd like to know what war is. What is war anyhow? . . . Is it war to shoot my aunt?' says th' dillygate fr'm Chiny. Cries of 'No, no.' 'Is it war to hook my father's best hat that he left behind him when he bashfully hurried away to escape th' attentions iv European sojery?' he says. 'Is robbery war?' says he . . . 'I'd like to go back home an' tell them what war really is. A few years back ye sint a lot iv young men over to our part iv th' worruld an' without sayin' with ye'er leave or by ye'er leave they shot us an' hung us up by our psyche knots, an' they burned down our little bamboo houses. Thin they wint up to Pekin, set fire to th' town an' stole ivrything in sight. I just got out at th' back dure in time to escape a jab in th' spine fr'm a German that I never see before. . . . Was that war, or wasn't it?' he says. 'It was an expedition,' says th' dillygate fr'm England, 'to serve th' high moral juties iv Christian civvyllization.' 'Thin,' says th' dillygate fr'm Chiny, puttin' on his hat, 'I'm f'r war,' he says. 'It aint so rough,' he says. An' he wint home."

War is war, by whatever name it is called. We have indicated one or two cases in which an inclination to subjectivity produces unnecessary and dangerous refinements. Something of the same subjective leaning induces Professor Westlake to approve of the "continuous voyage" theory, which, after surviving the criticism of Twiss and Hall (to name only English writers), has collapsed at the touch of actual war and the outspoken disapproval of Germany. He seems, again, to have been misled (perhaps by Calvo), in making the broad statement that in the *soi-disant* pacific blockade of Lisbon (1831) the captured vessels were merely sequestered. The entire Portuguese navy was captured, and so far as appears was never restored; the capture being justified on the ground of prize (De Martens, *Nouveau Recueil* IX, p. 469; *Hansard*, 3rd Series, VI, 99; *Annual Register*, 1831, p. 447). Certain merchant-ships and men-of-war captured at an early stage of the proceedings were restored, in pursuance of the convention which closed the incident. Calvo, quite unjustifiably, transforms this into a general restoration: and he is also entirely wrong in saying that the demonstration, "*conserva jusqu'à la fin la qualification de 'pacifique' que la France lui*

*avait attribué.*" The very convention which he quotes talks of the "*prisonniers de guerre*" and "*les présentes hostilités.*" (For the facts of violence, see Atherley-Jones, *Commerce in War*, p. 109.) The loss of the fleet had most injurious results for Portugal when invaded by Pedro in the following year. It is curious to notice, when the cases are carefully examined, how few and how abnormal are the cases in which such "blockades" ever existed, except as the preliminary operations of a war. Dr. Westlake thinks that the practice (except perhaps as against third parties) is now beyond attack. The Venezuelan proceedings of a few years back seem to us to demonstrate the exact opposite.

In the House of Commons (17 Dec., 1902),<sup>1</sup> interrogated as to whether Venezuelan and "neutral" vessels would be treated alike, and whether, if so, the United States were expected to submit to the exclusion of their commerce from Venezuela, Mr. Balfour observed:—"I think it very likely that the U. S. Government will think there can be no such thing as a pacific blockade, and I personally take the same view. Evidently a blockade does involve a state of war." And, on an Irish Member's exclaiming—"A state of war! Has war been declared?" he added: "Does the honourable and learned gentleman suppose that without a state of war you can take the ships of another Power and blockade its ports?" We rank Mr. Balfour as a statesman above Count Molé, and believe that he took the correct view.

The Turkish blockade of 1827, the Mexican of 1836, the Dutch of 1832, and the Formosan of 1885, ran out into war. The Argentine of 1845 was finally recognised as a war measure by Palmerston, and the Venezuelan of 1902 by Balfour. We know of no others, except the Peruvian blockade of Ecuador in 1858, the Greek blockade of 1886, which failed ultimately to prevent war between Turkey and

<sup>1</sup> Hansard, 4th Series, Vol. 116, p. 1490.

Greece, and the egregious case of Don Pacifico in 1850. Pacific blockade is a proved failure.

Mr. Balfour's plain declaration that the forcible measures taken in 1901 were inconsistent with a state of peace is likely to become classical, and appears conclusive against the theory that organised violence against a State can be anything but war.

Professor Westlake takes the Hague Convention on war and expounds it in a masterly fashion, paragraph by paragraph. In the last chapters, he gives an equally able and effective account of the changes introduced by the recent Conference, and discusses with felicity and point the matters on which the plenipotentiaries failed to agree. The dissertation on cable-cutting may be instanced as a model of brevity and good sense. We may regret his justification of the bombardment of defenceless savage villages, and the sweeping deductions which he makes from a high and dry theory of neutral obligation. The surprising altitude of the latter may be measured by the fact that he does not see how it is possible to object to the cutting-out of the *Retshitelny*, which was lying in Chinese neutral waters, laxly disarmed; the Japanese themselves did not venture to defend it on this ground. It can hardly be that a neutral's territory is subject to the violent interference of a belligerent who thinks himself hardly used. Any such doctrine would be subversive of all law; and, if it were accepted, every declaration of war would plunge the whole world into anarchy, or else a universal Armageddon.

T. BATY.

## VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

### Hayti.

**S**INCE the institution of legations dates from a period considerably earlier than that of Grotius, it might be thought that the rules regarding the position and immunities of public ministers would by this time have been worked out with entire completeness. Recent events have shown that such is far from being the case. The extent of the immunity of the Minister himself has been canvassed in the late instances of the French envoy to Caracas and the Persian Ambassador at the Quirinal. The inviolability of his residence is the subject of discussion, owing to recent events in Hayti.

The first hint that anything was wrong appeared in a somewhat singular statement that one of the officers of a British man-of-war had been insulted in the street at Port-au-Prince, and that an official apology had been secured by a threat of bombardment. It was a singular statement, because the bombardment of an open town is a measure inadmissible in war-time, and somewhat disproportionate as a means of solacing a sense of wounded dignity. Also, if a government is to be condemned to live in a blaze of apology for every irresponsible act of its street arabs, it will either have no time left for anything else, or it will have to employ a Minister of Manners, as some Indian journals are said to employ a Prison Editor. There was obviously more in the incident than met the eye. The next development was the sensational news of the alleged plot to overthrow the Government and subvert the Constitution. The established authorities shot some dozen of the supposed conspirators. They demanded the surrender of many more who, as suspects, had crowded into the legations.

It is the old story which is familiar in the youthful history of those South American States which are now so highly respected as fields for the investment of European capital. Political organization in these cases is an unstable compound. Its decomposition is explosive. The flight of the Haytian refugees to the foreign legations can be paralleled *ad nauseam* from the history of Chili and the Argentine. Instances of the like kind have occurred in the mother country of Spain. Hall notices that Serrano received asylum in 1873 at the British legation at Madrid, and Espartero in 1841 (with many of his followers) at the Danish. In the latter instance, the service to the conspirators was of so signal a character, that the Minister was afterwards ennobled by them as Baron del Asilo!

The juristic position in such cases is far from clear. The ex-territorial character of the legation makes it improper and illegal to reclaim the fugitives by force. But it is equally clear that the embassy ought not to be made an asylum for fugitives from the national justice, and that persons who take refuge there ought to be given up, with the sole normal exception of members of the ambassador's suite. It is asserted, however, that an extraordinary exception exists in cases where political contests are of the sanguinary nature common in unstable communities. It may perhaps be stated as a recognised rule, that where politics are accompanied by proscriptions, a State may, without offence, give asylum at its legations to political refugees. As a corollary to this, it may apparently demand a safe exodus for them. It is stated, however, that the legations were regarded by the Haytian cabinet as the foci of insurrection. This cannot, so long as diplomatic relations subsist, be made a ground of curtailing their immunities. The proper course, if a minister is suspected of countenancing political plots, is to demand his withdrawal, or, in a case of urgency, to expel him. An intermediate situation, in which he is



permitted to remain with eclipsed prerogatives, is inconsistent with diplomatic security and is impossible of admission. Hall would limit the extraordinary privilege of asylum in the case of political refugees to the legations of foreign powers in non-European countries, and regards the Spanish examples as anomalous. It is perhaps wiser to say, with Calvo, that—" . . . *On ne saurait se guider en cette matière que par d'après des considérations générales d'humanité et le sentiment des justes égards que les nations se doivent les unes aux autres. Nous admettons donc qu'au milieu des troubles civils qui surviennent dans un pays, l'hôtel d'une légation puisse et doive même offrir un abri assuré aux hommes politiques qu'un danger de vie force à s'y réfugier momentanément.*" We shall qualify this, however, by saying that such an asylum can only properly be given when the proceedings of the triumphant party are such as to shock by their wholesale violence, or their summary injustice, the conscience of the neutral spectator. There must be something of the nature of a proscription. Mere severity cannot be regarded as sufficient. It is submitted that it is not the circumstance that a revolution has its *locale* in Central or South America, but the fact that a revolution there is likely to be attended by sanguinary reprisals, that invests a minister with the right to harbour refugees. And the right can hardly be refused to the victorious party of requesting the withdrawal of the compassionate ambassador as an envoy personally unwelcome to it. Should he really be implicated in treasonable plots, he can hardly now-a-days be arrested and his archives seized, as was done in the cases of Gyllenborg, who was proved to be implicated in the conspiracy engineered by Cardinal Alberoni against George II. But he can certainly be forcibly expelled.

We may safely dismiss the report that the representatives of the foreign Powers intimated to the Haytian Government that they would view with disapproval any more executions.

They were not the constituted judges of the requirements of the situation. If it were entirely true that the severity employed was uncalled for, it is sufficient answer that Hayti is Hayti and not France or England. What would be thought of a Russian Minister who should inform a British Premier that his Government, from the heights of a sublime moral consciousness, would "regard with disapproval" any repetition of particular forcible measures in Ireland or South Africa? The reported arrangement by which the refugees were transferred to a French vessel appears to be entirely in accordance with the usual procedure.

With these events in Hayti may be compared the still more recent *émeute* in Persia, where it seems that some sort of right, not only to harbour refugees, but to have their resort to the asylum unimpeded, has been conceded to the foreign legations. This can only be regarded as a display of the weakness of Persia.

Hayti is chiefly remarkable from a juridical point of view for the curious prædial legislation of eighty years ago. A good deal is heard at present about the cries of "Back to the Land" and "The Right to Work." The Haytian legislation referred to made work on the land not only a right but a duty. It enforced the obligation by stringent and almost savage penalties. The consequence was, that overseers (*gérants*) occupied precisely the position of slave-overseers. A small treatise, published anonymously in 1827, observes that few of the ingredients of slavery seem to be wanting. The rural population was *adscriptus glebae*, ordered to work without cessation from Monday daybreak to Saturday sunset, with intervals of two and a-half hours daily for meals, taken *sur le champ*. Dancing and feasting at night were forbidden: in fact, the statute followed very closely the provisions of the Jamaica Slave Code. From its provisions were excepted persons in State employment, domestics, working artisans, and licensed professional men

(and, implicitly, landlords and tenants of estates and their agents). As the ultimate coercion of the agriculturists must be in the military power, it was forbidden to recruit it from their ranks. The constitution of Hayti by this means became a military despotism. A quarter of the net proceeds of farms was to be divided among the labourers, "according to their strength and activity, and the time they have respectively worked." Remarkable in a "Republic" is the provision that "*les agriculteurs seront soumis et respectueux envers les propriétaires et fermiers avec lesquelles ils auront contractés, ainsi qu'envers les gérans.*" They were also put under a statutory obligation to work with energy and care: a clause comparable, perhaps, with that in a recent English statute which creates a duty to "befriend" certain people. "Quashee, rejoicing in abundant pumpkin," had his enjoyment therefore on strictly servile terms.

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A surprising note of the resident consuls, by which, in 1883, they threatened to bombard the Government buildings, and to sweep the streets with artillery, if order were not restored forthwith in Port-au-Prince, is worth recording as a curiosity. Such a measure would be an intrusive interference in the affairs of an independent State, which is as much entitled to the luxury of civil war as is Russia or Japan.

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### Ambassadors.

The position of the Haytian legations has been discussed above. The cases of M. Taigny, French Chargé d'Affaires in Venezuela, and of Prince Malcolm Khan, Persian Envoy in Italy, have been treated of in previous numbers. To the list of diplomatic incidents of this nature may be added the reported unwillingness (now contradicted) of the Court of Berlin to receive Dr. Jayne Hill as Ambassador of the United States. A Cabinet is not bound to state its reasons

for regarding a proposed envoy as *persona minus grata*. Germany would, of course, have been perfectly within its rights in declining to receive any proposed representative. Mention may also be made of the action of the Venezuelan postal authorities in opening valises containing official correspondence of the United States. The enclosures do not appear to have been tampered with; and the act was explained as being the outcome of a mistaken impression that the correspondence was of ordinary private character. As a more or less cognate matter may be mentioned the successful efforts of the British Ambassador in securing the release of a naturalized British subject, who was imprisoned in Russia as a suspected revolutionary. Britain has consistently refused to listen to representations of a similar nature made by the United States on behalf of Irish-Americans accused of Fenianism; and the Russian Government's action was all the more obliging, if it is true, as alleged, that the gentleman in question was a near relative of an admitted revolutionary.

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### Forum non conveniens.

Events are moving fast. Two years ago, no English lawyer would have had any hesitation in advising that anyone could be sued for any transitory cause of action in the Supreme Court of Judicature for England and Wales, if he could be served with a writ within the realm. Increasing frequency of communication with foreigners has brought it about that the principle is found to be productive of some injustice. It may be questioned, even so, whether the right way to abolish it was not by legislation rather than by the sweeping use of the prerogative of the Court to stay vexatious and oppressive actions. The latter course has been followed on three recent occasions. In all three cases, it was maintained that it was not the mere inconvenience to the defendant which provoked the stay. It

was the oppressive inconvenience. Since, however, the facts in each case amount to nothing more than grave inconvenience, the practical result is that grave inconvenience is ranked as "oppression." In the result, a high prerogative power of declining to entertain oppressive proceedings is drawn into a power of laying down limits to the local jurisdiction of the King, which have never been imposed by any judge from Holt to Herschell.

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In the case of *In re Norton's Settlement* (L. R. [1908], 1 Ch. 471), the new doctrine was pushed to startling lengths, preventing a wife who was unable to live in India from suing for an account in England, her husband trustee, whose domicile was in Madras. The reason was that his practice as a barrister would suffer if he had to attend to the action in England. The language of Kennedy, L.J., even suggests that all disputes between a wife and her husband ought to be settled in the matrimonial domicile. The inconvenience to the wife of prosecuting her claim in India, where she had found she could not live in health, was postponed to the claims of the husband's business, and the supposed ruin which would attend it if he defended the English suit. It is fair to say that Williams, L.J., was greatly impressed by a letter which the plaintiff's solicitors had addressed to the defendant, and which his Lordship regarded as evidence that the suit was oppressive.

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This is the latest development of the doctrine, which was first initiated in *Logan v. Bank of Scotland* (L. R. [1906], 1 K. B. 141). There were peculiar circumstances about the last-named case: the plaintiff was domiciled at Inveraray: the amount claimed was trivial: above all, the defendant bank was only in England for the purpose of service by a fiction of law. Another defendant (but, it was said, not a substantial one) was however in England, and the plaintiff

urged that the suit should proceed, if only to secure his liability to damages and discovery. The Court of Appeal stayed the action. Barnes, P., remarked on the hardship to an Edinburgh bank of bringing its books and witnesses to London on a £50 claim. The Bankers' Books Evidence Act would have mitigated the hardship; and in any event it was one for the Legislature to correct.

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In the intermediate case, *Egbert v. Short* (L. R. [1907], 2 Ch. 205), which curiously resembled *In re Norton*, Warrington, J., not only stayed, but dismissed, the action brought by a lady against her Indian solicitor in the matter of a separation deed. Here again the Court showed an extraordinary tenderness for the claims of a legal practice, and the circumstance that the plaintiff was within the jurisdiction was held not to differentiate the case from *Logan's*.

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It is easy to see that the elaboration of a code of jurisdiction in this piecemeal fashion is likely to lead to much more injustice than it will ever prevent. How can a litigant know precisely what inferences may be drawn by a Court from incidental remarks in letters, and from the imperious necessities of business which weigh upon a banker and a solicitor? We are not defending the Common law rule, which probably resembles that of no other civilised country, except America; and we do not forget the well-established principle which enables the Court to decline to harass a defendant with double litigation when process is already pending abroad. But we unhesitatingly affirm that the position will become chaotic unless some fixed and definite rules are laid down by the Lords or the Legislature. It will not be forgotten that in *Norton's* and *Logan's Cases* the appellate tribunal reversed the decisions of such careful and competent judges as Phillimore, J., and Eady, J.

### The King of Iceland.

The latest instance of the fissiparous tendency of the Scandinavian kingdoms is displayed in a project which has been approved by the Danish Parliament regarding the autonomy of Iceland. Iceland has, since 1874, enjoyed a large measure of independence; but, by the new arrangement, the Icelandic Government becomes altogether free from Danish control. The only mark of union appears to be "the golden link of the crown." Even there, the union is reduced almost to its lowest terms. The King of Denmark is also to be King of Iceland—which sounds like the title of a monarch in a fairy story—and that is all. The union will thus closely resemble that which formerly existed between Norway and Sweden. Clearly, such a connection constitutes a "real" union, which confers no separate international existence on either of the parties to it. The Icelandic negotiators had wished for the recognition of Iceland as a sovereign independent State, with the King of Denmark as its head. Probably this involves a contradiction in terms. States are not like joint-stock companies, which can—(if they seldom do)—fight each other under the presidency of a common chairman. Hanover was not independent of Britain in George III's reign. But whether it does involve such a contradiction or not, Denmark refused to accept the principle. The example of Norway is too recent and too instructive not to prove deterrent. It is difficult, indeed, to see why it should not have availed to warn the Danish Court against the dangers of entering upon the path of conceding to Iceland a constitutional independence to which no international independence is annexed. Sooner or later it will carry international independence along with it.

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It has been remarked that: "In our time the usual rules of International law cease to be applicable, or fail to give an

adequate solution of difficulties just in proportion as the fact of territorial sovereignty is not complete and definite." If it be true that "Sovereignty is partible"—and we think it is—it is none the less true that all recognition of divided sovereignty is at present quite rudimentary. Before the world can be induced to recognise a State enjoying a limited sovereignty, it must be demonstrated very clearly exactly what the limitations of that sovereignty are, and it must be placed beyond doubt that the autonomy (though limited) is irrevocable, not only in constitutional theory, but in the face of foreign Powers, by express intimation to them. The child must be acknowledged by its parent before the family. No one can pretend that the juristic consequences of such a divided sovereignty have been worked out, or even sketched. And until the nations feel more sure about them, they will be indisposed to recognise fractions of independence. It is one of the most pressing needs of the time to smooth the pathway in this direction. Since the Peace of Westphalia, Europe has been organised on a basis of absolute territorial sovereignty. The problem is now to provide for the recognition of qualified territorial sovereignty. It is one which will not be solved in a year, or a decade.

T. BATY.

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#### IX.—NOTES ON RECENT CASES (ENGLISH).

SEVERAL cases in last quarter's Reports are useful, chiefly as showing how desirable is a little charity of thought and expression when one is dealing with points of law. Take *In re Hudson, Cassels v. Hudson* (L. R. [1908], 1 Ch. 655), for example. Most lawyers have taken it for a settled principle that equitable estates in land devolve according to the customs governing the descent of the legal estate. *Scriven on Copyholds* after stating this, qualifies it by adding, "but for this purpose the trust must be an



express executed, and not an executory or implied trust." This statement is, of course, on the face of it nonsense, because the principle applies when an equitable estate—such as an equity of redemption—arises without any trust at all, and the question, as we shall see, which arises in the case of an executory trust has nothing to do with the principle at all. And in consequence of this statement Eve, J., was occupied for two days listening to learned arguments which were altogether beside the point he was to decide, and finally his lordship delivered a judgment which closely resembled the arguments.

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The question which arises in the case of an executory trust is not how is the estate to devolve, but whom does the settlor intend to take? And in deciding that the Court applies the ordinary rule of construction, that when heir is used as a word of purchase it means primarily Common law heir. Coke laid that down some hundreds of years ago (see *Co. Litt.*, 10 a). And the rule applies just as much to legal estates as to equitable estates (see *Garland v. Beverley*, L. R. [1878], 9 Ch. D. 213, and *Owen v. Gibbons*, L. R. [1902], 1 Ch. 634, at p. 647). And yet we have learned counsel citing case after case where the Court has held that when a settlor left customary freeholds or copyhold in trust for a certain person's "heirs," he meant such person's Common law and not his customary heirs, in order to show that customs of descent do not apply on the death intestate of the owner of an equitable fee arising under a resulting trust. And a learned judge considers these cases, and decides most rightly that they do not establish this contention, without drawing attention to the fact that they have absolutely nothing to do with it.

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*Copestake v. Hoper* (L. R. [1908], 2 Ch. 10), is another instance of confused thinking. *Kekewich, J.*, held that a

mortgagor in possession of freehold land, parcel of a manor, was, because he was in possession and his equity of redemption was an equitable fee simple, "seised" of it within a custom of the manor, which entitled the lord to a heriot on the death of a tenant so seised. Now whatever "seisin" may be, it depends on principles of the Common law, settled centuries before equitable estates were heard of—indeed, equitable estates were invented largely to escape from its toils—and how the possession of an equitable fee can affect it one cannot imagine.

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There are four recently reported cases upon Wills which should be noted. In *In re Bruce, Lawford v. Bruce* (L. R. [1908], 1 Ch. 850), it was held that the sole residuary legatee of a deceased person who was indebted to a testator, but whose debt is statute-barred, must, if he claims a share of the testator's residue, bring into account the statute-barred debt with interest. Contrast with this, *In re Abrahams, Abrahams v. Abrahams* (L. R. [1908], 2 Ch. 69), where it was held that where a person is entitled under the testator's will to an immediate share in his residuary estate, the executors are not entitled to set off against it a debt which he owes such estate, but which is payable only by instalments. The decision in *In re Jameson, King v. Winn* (L. R. [1908], 2 Ch. 111), is somewhat doubtful. There a testatrix who had had shares in a local bank made her will after such local bank had been absolutely absorbed by another, and she had accepted shares in the other in lieu of those in the local bank. By her will she purported to give the shares which had ceased to exist to a legatee. Held that this was a mere misdescription, which could be corrected by parol evidence. It seems rather to be no description at all. At any rate, in *In re Slater* (L. R. [1907], 1 Ch. 665), it was held that a similar description, where the absorption took place *after* the will was made, was no

description of the new shares. *In re Slater* (*supra*) did not go on the ground of ademption, as Eve, J., seems to have thought, and though it is not strictly applicable to the facts in *In re Jameson* (*supra*), still, if there is no description at all of the property intended to be given, to allow a description to be supplied by parol evidence seems very like allowing the will to be so made.

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Note that in *Burgess v. Booth* (L. R. [1908], 1 Ch. 880), Eve, J., disregarding the *dictum* of Jessel, M.R., in *Steed v. Preece* (L. R., 18 Eq. 192), held that where land is sold by order of the Court for a proper purpose, if more is sold than is necessary for that purpose, the proceeds remain land for purposes of devolution.

J. A. S.

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It is curious that the two cases of *Spiers v. Hunt* (L. R. [1908], 1 K. B. 720), and *Wilson v. Carnley* (L. R. [1908], 1 K. B. 729), each of breach of promise by a married man, known to be such by the woman to whom the promise was made, should have come before the Courts in the space of a few weeks. The decision could not have been otherwise than, that contracts "so deeply at war with the best interests of social life" were contrary to public policy and could not be enforced. The eloquent judgment of Lawrence, C.J., of Illinois, in a similar case before him, is excellent reading.

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Sect. 3 of the Conveyancing Act 1892 is less of a protection to an optative assignor of a lease which contains a covenant against assigning without licence, than a stimulus to independent action on his part if consent is withheld. For *Andrew v. Bridgman* (L. R. [1908], 1 K. B. 596), decides that he cannot recover a fine which he has paid for a licence; at any rate if the payment is made without

protest. The decision is based on the old principle, that money paid with full knowledge of facts cannot, though there was no debt, be reclaimed (*e.g.*, in *Cadaval v. Collins* [1836], 4 A. & E. 858); and upon a dictum of Stirling, L.J., in *Waite v. Jennings* (L. R. [1906], 2 K. B. 11), that the section does not make illegal the taking of a fine. But the effect of such a construction is, as Channell, J., said, at page 498 of L. R. [1907], 2 K. B., to bring the section "very nearly to a nullity." And practically it leaves the position of the lessee much where it was before the Act, as in *Treloar v. Bigge* for instance (L. R. [1874], 9 Ex. 151), viz., that he is at liberty to assign without the lessor's consent if it is arbitrarily refused.

It would be imprudent to assume from *Rex v. Stride and Millard* (L. R. [1908], 1 K. B. 617), that, in an indictment, a logical deduction from the language employed could be relied on to fill the place of a definite averment: and, further, that recognised forms of criminal pleading may be silently modified by changed conditions of society. But the case almost suggests as much, for it decides that a count charging a servant with feloniously stealing a thousand pheasants' eggs of the goods and chattels of and belonging to his master, may be a sufficient averment that the eggs had been reduced into possession; and that in a count for feloniously receiving them, knowing them to have been feloniously stolen, it is not necessary to aver, as the practice is at the Central Criminal Court, that the stealing was in fact a felony. It is no doubt clear to reason that so great a number of eggs must have been collected from many nests, but that is only an inference; and of course there are cases in which pheasants' eggs would not be subjects of larceny at all. But as far as public advantage is concerned, it is probable that in both points the decision is acceptable, for since the amendment of the Criminal law, some relaxation might

well be allowed in pleadings fostered into extreme technicality by the severity of ancient punishments.

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But money-lending transactions are ruled by quite different considerations. No public advantage would be served by relaxing sect. 10 (3) of the Bills of Sale Act 1878, which voids the registration of a bill made subject to a condition not written upon the paper of the document itself. And therefore in *Pettit v. Lodge and Harper* (L. R. [1908], 1 K. B. 744), it is now well decided that a variation in the terms of repayment made after registration invalidates the bill even though the total amount to be repaid is not increased.

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One wrong decision leads to another. In *Reed v. Franks* (16 Times L. R. [1900], 347), such a Bill was upheld on the very ground that an agreement made subsequent to registration was not one "to alter the rate of interest but merely an arrangement as to the manner in which interest should be paid." And it was probably in reliance on this case that the defendant in the case last noted ventured to disregard sect. 10; and expressly on the strength of it Lawrence, J., ruled, when *Pettit v. Lodge and Harper* was before him, that the disputed bill of sale was good. This decision is now reversed, as noted above; and *Reed v. Franks* is over-ruled.

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When to a minor, who with an ample outfit has just gone up to Cambridge, an obliging tailor, after the manner of the place, supplies, within the next nine months, at a charge of £122, additional garments, including eleven fancy waistcoats at two guineas each, it would require somebody more acquiescent than the parent called upon to pay the bill, to look upon the new supply as necessities within sect. 2 of the Sale of Goods Act 1893. The Court in *Nash v. Inman* (L. R. [1908], 2 K. B. 1) have fortunately held that Ridley, J., was justified in withdrawing the case from the jury; and have

held also that the burden is in such cases on the plaintiff to show not only that the goods were suitable to the condition in life of the infant, but also that they were necessary to his requirements at the time; and if he had enough of such necessities more could not be necessary. And so the appeal on misdirection was not allowed.

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But there is another case, one of libel, in which appeal on the ground of misdirection rightly succeeded. In *Hunt v. Star Newspaper Co.* (L. R. [1908], 2 K. B. 309) the jury seem to have been directed that anything which imputes blame to a plaintiff is not fair comment, and it seems also that the defences of justification and of fair comment were not separated when left to the jury.

Appended as a note to this case is a report of the interesting one of *Dakhyl v. Labouchere*, decided as long ago as March, 1907, by the House of Lords. At the trial, which took place three years earlier, the jury were instructed from the Bench as to the meaning of the word "quack," which was the turning point of the case. But the definition prescribed was halt and lame, for it did not cover half the ground to which the word extends. Dr. Murray's dictionary was not at that time advanced as far as the letter Q; but the quotations now available show a usage of the word much beyond that expounded to the jury. If the full meaning had been made clear to them, their verdict on the plea of justification might have been different. Moreover, the separate plea of fair comment seems to have been withdrawn from them altogether. On both these grounds the order for the new trial was made.

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The case of *Bank of England v. Cutler*, noted in Vol. XXXII, No. 345 of this Magazine, has now, on the appeal of the defendant, been before the higher Court (L. R. [1908], 2 K. B. 208), who have dismissed his

appeal. But as Vaughan Williams, L.J., dissented from the judgment of his two colleagues, it is probable, considering the great interests which are touched, affecting amongst others the stockholders, the bank, and a considerable number of brokers, that the case will be carried up to the House of Lords. The dissenting Lord Justice's judgment is one covering more than thirteen pages; but the main points are that the position of the identifier was that of a mere witness; and that neither the fact that he was aware that identification was a condition precedent to the signing of the bank transfer book by the would-be-transferor nor his knowledge that, on his identification, this transferor would be allowed to sign, are sufficient to raise a request on which to base a warranty or promise of indemnity.

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The way of the transgressor is hard if he happens to be found out, and it adds a piquancy to his punishment if, as in *In re Myers ex parte Myers* (L. R. [1908], 1 K. B. 941), the means and measure of his castigation are provided by his own device which failed. The device here was a sham sale by deed of the business and stock of the vendor on the eve of his bankruptcy, in consideration of the purchaser taking the sole liability in respect of promissory notes to which both were parties. And the failure of the device was through a principle of law with which the parties are now well acquainted, "that a fraudulent deed though operative against the party is not operative for him." The quotation is from a judgment of Mr. Commissioner Fane in 1848, apparently communicated as a note to the reporter of *Ex parte Oliver*, in 4 De G. & Sm., page 364; and the effect of the principle upon this transaction was to benefit the creditors of the bankrupt by relieving the estate of any claim against it for the promissory notes which he had signed, while preserving to them the property which he professed to have sold.

T. J. B.

## SCOTCH CASES.

The phrase "jointly and severally" as used in the law of Scotland, has been the subject of much uncertainty of interpretation and probably of some confusion of ideas. In *Flemings v. Gemmill* (45 S. L. R. 281), it was seriously contended that, where six defenders were sued jointly and severally, it was incompetent to grant decree against three and assoilzie the other three. The Sheriff-substitute before whom the case originated hesitated, in view of the uncertain state of the law, to apportion the liability between the parties in the manner desired by the pursuer, and ultimately did so only to prevent what he considered a practical miscarriage of justice. The Court of Session afterwards sustained the Sheriff's judgment, and has thus removed doubt which probably should never have existed, and which has hitherto caused much practical inconvenience.

The words "jointly" and "severally" taken separately are not difficult to define. An obligation for which two or more parties are liable "jointly" means an obligation for the implement of which each party is liable only for his share or proportion. On the other hand, the word "severally" means that each of the obligants is liable to perform the whole obligation whenever called upon by the creditor. It is seldom that either "jointly" or "severally" is used by itself. Except where the nature of the document (*e.g.*, a bill of exchange) of itself implies a "several" obligation upon all the obligants, the obligation is "joint," while in a case where the obligation is intended to be several, it is usual to employ the phrase "jointly and severally." In the judgment under notice, the question negatived by the Court was practically, whether the conjunction referred to created a new kind of obligation not expressed by either of the component words. It was argued that, in order to make the decree competent, the pursuer



should have added to the phrase "jointly and severally" the additional words "or severally," but the Court was of opinion, in the words of Lord M'Laren, that such additional words were "mere surplusage." The matter is one of pleading and seems of little importance, but the fact that it has caused trouble in the past makes it a subject of congratulation that the law, or rather the procedure, has now been placed on a satisfactory basis.

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In the law of Agency it is an easy transition from the *status* of a "special agent" to that of a "general agent." The dividing line is at all times narrow and is easily bridged over by the doctrine of "holding-out." But in *Hayman v. American Cotton Oil Company* (45 S. L. R. 207), two elements prevented the usual consequences of "holding-out": (1) there was fraud on the part of the agent in relation to his principal; and (2) the existence of such fraud was, or ought to have been, brought home to the party transacting with the agent by the suspicious circumstances surrounding the negotiations.

The agent in this case met a customer who knew of the agency and pressed him to buy a quantity of his principals' oil at 1s. per cwt. below the market price (which was a rising one), indicating that he personally was "hard up" and "badly wanting money." The offer was accepted and the price paid, but the purchaser did not obtain the oil, it having been stopped in transit from America on account of the intervening bankruptcy of the agent.

The purchaser contended that, having entered into a contract of sale and purchase with the American company through their Glasgow agent, and having paid the price, he was entitled to delivery. The American company, on the other hand, maintained that in this case the agent had acted as a merchant and had resold on his own account. He had no authority as an agent to induce a sale on the

ground of his own personal convenience at a price lower than that current in the market. The Court held that the circumstances pointed to knowledge on the part of the purchaser that the agent was acting on his own account and that therefore the principals were not bound.

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In our issue of May 1907 we noted the case of *Murdoch's Trustees v. Weir* [1907], S. C. 185, in which a testator left the whole residue of his estate to be employed in "instituting and carrying on a scheme for the relief of indigent bachelors and widowers who have shown practical sympathy in the pursuits of science." The Lord Ordinary had held the will void from uncertainty, but the Second Division reversed and sustained it. The case has now come before the House of Lords on appeal, with the result that the judgment of the Second Division has been sustained and the will declared valid. The Lord Chancellor stated the legal proposition thus:—"All that can be required is that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator. . . . Persons who have shown practical sympathy in an object obviously are persons who have given time or money or made some sort of sacrifice to further it. I am satisfied that the trustees, or failing them the Court, would find no difficulty in giving effect to the bequest."

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In *Mulvein v. Murray* (45 S. L. R. 364), a contract had been entered into between an employer and his retail traveller, by which the latter bound himself "not to sell to, "or to canvass, any of the employer's customers, or to "sell or travel in any of the towns or districts traded in "by the employer, for a period of twelve months from "the date of the termination of the agreement." The usual objection was taken that the restriction was un-

reasonable and invalid as being in restraint of trade. The Court held that the restriction not to sell to, or canvass the customers of the employer was reasonable and valid, but that the remaining part of the restriction was too wide and indefinite in the matter of (a) the district of area; (b) the nature of the trade prohibited. In the course of his judgment Lord Ardwall stated that all such agreements were originally void at Common law, as being made in restraint of trade and contrary to public policy, but to this general rule exceptions have been from time to time admitted on the ground that the restraint imposed was reasonable and proper on a consideration of the contract between the parties. His Lordship was of opinion that the provision binding the traveller not to sell to or canvass, within the period named, any of the employer's customers, was valid and was separable from the other parts of the agreement. On the other hand, the restriction not "to travel in any of the towns or districts traded in by the employer for a period of twelve months after the termination of the engagement" imposed an unreasonable restraint upon the defender." It was too wide and too vague. For all that appeared, the employer may have traded in every district in Scotland and England too. The word "district" is in itself a very vague term, as it is not a known geographical division of either town or country. The defender was left entirely in the dark as to what towns or districts he was precluded from selling or travelling in. Reference was made in the course of the judgment to the decision of the House of Lords in *Nordenfeldt v. Maxim-Nordenfeldt Gun and Ammunition Company* ([1894], A. C. 535); *Baker v. Hedgecock* (39 Ch. D. 520); and to the Scottish case, *Dumbarton Steamboat Company v. Macfarlane* (1 F. 993).

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The phrase "the seller's skill and judgment" used in sect. 14 (1) of the Sale of Goods Act 1893, is surrounded

by difficulties not so much as to its meaning as to its application. The transaction in *Crichton & Stevenson v. Love* (45 S. L. R. 600) was a tripartite one. An agent for a firm of coalmasters, in the course of pushing for orders, saw the agents for a cargo steamer, and in conversation told them that his coal would suit them as well as another specified coal which they were in the habit of using. The ship's agents expressed their willingness to give an order, but stated that all their orders for coal were made through a certain coal merchant. The coalmasters' agent saw this coal merchant, and both parties being in the knowledge of the communings with the ship's agents, received an order for a quantity of named coal. When it came to be used on the ship, the coal was found so defective in quality as to be useless, and was rejected.

The contention of the sellers was, that the transaction between them and the coal merchant, being an unqualified sale of a coal known in the market by a special name, and there being no question as to price or delivery, they had no responsibility in regard to the suitability of the coal for any particular steamer. The coal merchant, on the other hand, contended that the previous conversations between the pursuers' agent and the ship's agents must be imported into the final contract, and that a case was thereby disclosed in which the ship's agents had relied on the skill or judgment of the seller under the statutory provision referred to.

The Sheriff-substitute, in whose court the case originated, expressed the rather peculiar view that the most important phrase in sub-section (1) of sect. 14 is the parenthetical one "whether he be the manufacturer or not." In his opinion, the only thing before the mind of the draftsman of the Act was the sale of manufactured articles, and if the section applied to products as well as manufactures, the entire clause would operate differently in the respective cases.

In so expressing himself, it is evident that the Sheriff-substitute had not followed historically the introduction into the clause of the words to which he specially refers. In reversing the judgment, the Court of Session had no difficulty in clearing away this misapprehension, and referred particularly to the case of *Gillespie v. Cheney* (L. R. [1896], 2 Q. B. 59), which the Lord President characterised as a very valuable decision upon the construction of the statute. In the view of the Appellate Court the transaction between the three parties fell to be considered as one, and could not be viewed without reference to the negotiations preceding the sale, although, for special purposes, another party was introduced as the final contractor.

R. B.

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### IRISH CASES.

A judge who finds himself called on to decide between conflicting views of Preston and Sugden on a question of merger, with no binding authority to guide him, must indeed feel that he is *inter apices juris*. Such an exercise in legal mountain-climbing fell to the lot of Barton, J., in *Hurley v. Hurley* ([1908], 1 I. R. 393). It was a question as to whether the purchase by a husband of the reversion in fee upon chattels real, the property of a wife whom he married before 1883, operates *ipso facto* to effect a merger of the terms. A rule is distinctly laid down by Mr. Preston (3 *Conveyancing*, pp. 273—303) to the effect that “where a freehold is held *suo jure*, and a term *alieno jure*, there is no merger when the estates coalesce by an act of law, such as marriage, but there is merger when they coalesce by an act of a party, such as purchase.” The last words of this rule, if sound, undoubtedly cover the present case: but in opposition to them, the contrary view is expressed by Lord St. Leonards (*Vendors and Purchasers*, 14th ed., p. 649). The authorities cited in support

of Preston's view were for the most part not later than the early seventeenth century, and it is needless to say that merger is very much less favoured now than then. Eventually the Court came to the conclusion that Preston's view is erroneous, and that there is now no reason for engrafting his supposed exception upon the general rule laid down by Lindley, L.J., in *In re Radcliffe* (L. R. [1892], 1 Ch. 231). That rule is, briefly, that "in order that there may be merger, the two estates which are supposed to coalesce must be vested in the same person at the same time and *in the same right*." It is not too much to say that the tendency of our present-day law is so decidedly against merger that it can only be held to take place in the very exceptional cases where it can be clearly shown to be for the benefit of the person in whom the two estates have met.

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Another but a less interesting case of first impression had to be decided by Wylie, J., in *In re Gore-Booth's Estate* ([1908], 1 Ir. Rep. 387), as to the law of powers. What is the effect of an appointment by deed, reserving a power of revocation by deed or will, followed by a revocation by will? The matter arose in this way. A marriage settlement vested lands in trustees for a term on trust to raise for younger children such sum, not being more than £20,000 or less than £10,000, as B. should by deed appoint, and in default of appointment to raise £10,000: the sum so appointed, or the sum of £10,000, was to be paid to all or such one or more of the children as B. should *by deed*, with or without a power of revocation and new appointment, or by will, appoint. B. by deed appointed that a sum of £10,000 should be raised immediately after his death, and a further sum of £10,000 after the death of the survivor of himself and another person; and by that deed he reserved a power of revocation as to both these sums *by deed or will*. Subsequently, *by will*, B. appointed the first of these sums

among his children equally, and revoked the appointment of the second sum. The question now arose, was this testamentary revocation valid? The Court held, upon principle, that it was not, and that therefore the second sum remained a valid and subsisting charge. A somewhat similar question had been discussed, but not decided, in *Cooper v. Martin* (L. R., 3 Ch., Ap. 47).

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The Trades Disputes Act, 1906, came for the first time before the High Court in Ireland in *Larkin, Appellant; Belfast Harbour Comrs., Respondents* ([1908], 2 Ir. R. 214): and the point decided, though a narrow one, is important. Briefly, the case decides that the Act, in legalising "peaceful picketing," does not confer a right to enter on private property against the will of the owner. The material section was sect. 2, which enacts (in substance) that it shall be lawful for persons acting in contemplation or furtherance of a trade dispute to attend *at or near* a house or place where a person resides, or works, or carries on business, or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working. The appellant, in the course of a strike in Belfast, had addressed a meeting of workmen on a quay the property of the respondents. There was a bye-law prohibiting persons from addressing a crowd on a quay without permission in writing from the Secretary to the Commissioners. For a breach of this bye-law the appellant was summoned and fined by the local justices. On a case stated for the King's Bench Division, it was contended on his behalf that the bye-law in question was contrary to sect. 2 of the Act, and should be held impliedly repealed. The Court, however, construing the section strictly, decided that "at or near" was not equivalent to "in or upon," and that the bye-law was unaffected by the section. It is hard to see

how the decision could have been otherwise, and the point is only noteworthy on account of the importance of the statute.

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Another new statute which made its first appearance in Court is the Companies Act, 1907; and again the decision (as to the effect of sect. 15) was fairly obvious. That section provides that where a company has redeemed any debentures previously issued, it shall, unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemed debentures were issued), have power to keep the debentures alive for the purpose of re-issue. In *Fitzgerald v. Persse Ltd.* ([1908], 1 Ir. R. 279), a company had before 1907 deposited from time to time some first debentures with its bankers as security for an overdraft: the debentures were transferred from nominees of the company to a trustee for the bank, and on payment of the overdraft were re-transferred. It was held that sect. 15 preserved the original priority of these debentures. The company in 1901 invited subscriptions for second debentures by a prospectus containing the statement that the issue was made for the purpose (*inter alia*) of repaying a temporary loan from the company's bankers. There were also express statements in the prospectus that these second debentures were to be puisne and subject to the whole of the first issue. The loan from the bank was repaid out of the proceeds of the second issue; and some first debentures, which had been deposited with the bank as security and transferred to trustees for the bank, were re-transferred to nominees of the company. It was held that these first debentures were not "redeemed in pursuance of any obligation to do so" within the meaning of sect. 15, and that their priority was not disturbed.

J. S. B.



## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

*Exterritoriality: The Law relating to Consular Jurisdiction and to Residence in Oriental Countries.* By Sir F. PIGGOTT, Kt., M.A., LL.M. London: Butterworth & Co. 1907.

We have very little but praise for Sir Francis Piggott's book. The learned Chief Justice has strong opinions, and is able to express them with moderation and reserve. The Author holds firmly and in clearer terms than in his first edition to the safe doctrine, which he terms a "cardinal principle," that extraterritorial jurisdiction depends entirely on the will of the sovereign within whose dominions it is exercised: a will which is merely directed into peculiar channels prescribed by treaties (pp. 5, 176, 183, *et passim*). We cannot follow him where, as in his criticism of *Carr v. Francis, Times & Co.* (the *Muscat Case*), he makes the extent of territorial waters dependent simply upon the good pleasure of the proprietor of the adjacent land to regard them as his own. Such a sweeping permission would be inconsistent with the established rule of *mare liberum*. It is by no means the case that the three-mile limit is the creature of English law: it is the creature (even though the questioned creature) of European diplomacy. Sir Francis repeats his interesting comments on the limits of the power of the British Parliament, and hints that the Courts might refuse operation to a statute travelling outside the limits of its proper competence. This is precisely what the Scottish Court declined to do in *Mortensen v. Peters (The Moray Firth Case)*. We do not find that sect. 687 of the Merchant Shipping Act 1898 is included in the survey of our scanty ex-territorial criminal legislation—a section which makes any recent ex-member of a British crew amenable to British law for "offences" committed abroad, whether a foreigner or not. In criticising *Tootal's Trusts*, the Author repudiates Chitty's theory that there cannot be an "Anglo-Chinese" or other analogous domicile, but he maintains that there cannot be a "Chinese" domicile for a British subject. He rests the latter proposition on the unnecessary and dubious ground that by acquiring such a domicile a Briton would be able to withdraw himself from the jurisdiction of the Consular Court in certain matters (notably matrimonial). Surely,

by acquiring the Oriental domicile the Briton is not loosening the ties of his own jurisdiction—it would be those very ties that would bind him to accept the Chinese Courts and law in the exceptional cases where British Courts regard the Courts of the domicile as competent or the Chinese law as applicable. The true ground is submitted to be that residence as a member of a formally segregated and privileged community has no correspondence with that ordinary residence which, if sufficiently stable and prolonged, constitutes domicile. Sir F. Piggott gives excellent reasons for dissenting also from *In re Bethell*, but he had unfortunately no opportunity of discussing *Ogden v. Ogden*. The work, we should add, has practically been re-written. The discussion of Bankruptcy, for instance, has been expanded from seven to fourteen pages. Not only to persons practising or suable in the Consular Courts, but to all International lawyers, the treatise must be of the highest value.

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*The Criminal Appeal Act 1907.* By HERMAN COHEN, M.A., with an Introduction by Sir HARRY B. POLAND, K.C. London: Jordan & Sons. 1908.

*Criminal Appeals.* By A. C. FORSTER BOULTON, M.P. London: Butterworth & Co. 1908.

*The Law and Practice under the Criminal Appeal Act 1907.* By T. W. MORGAN. London: Stevens and Haynes. 1908.

These three works each contain the text of the Criminal Appeal Act 1907, the rules made thereunder and the forms, with, of course, notes, but they vary considerably in length according to the length and elaboration of the notes. Sir Harry Poland's Introduction to Mr. Cohen's book should be carefully read by all who are interested in the administration of the Criminal law. He has always been in favour of reforming the Criminal law, but he has grave misgivings as to the working of this Act, and fears that its consequences will be mischievous. He considers that the Act gives the judges far too much power, as they have the power of trying a man, and over-riding the verdict given by the jury. He is opposed to the verdict of a jury being dealt with at all by a Court of Appeal, and considers that "if the judges' recommendations" (in 1892 and 1895) "had been followed, with some modification, and the Criminal Department of the Home Office had been strengthened, there would have been ample provision for setting right the few miscarriages of justice which take place from time to time despite our admirable system of administration of the Criminal law." Mr. Cohen has examined the

Act very carefully, and his comments and suggestions are valuable. In view of the recent discussion between Sir Harry Poland and Mr. Bowen Rowlands, it is worth noticing Mr. Cohen's opinion that the Court of Criminal Appeal can grant a *venire de novo*, though not a new trial. An interesting point discussed is whether a person who has pleaded guilty can appeal against his conviction. Mr. Cohen appears to think that the case may be covered by the words "any other ground" in sect. 3 (*b*), or, perhaps, as being a question "of mixed law and fact." Mr. Cohen points out a curious omission in the Rules, which is the want of any direction how a convicted person in custody is to apply for bail. We do not quite see why the Act did not empower the judge of the Court of trial to release the convicted person on bail if he saw fit. The Index, though the best in the books we have under notice, could with advantage have been made considerably fuller.

Mr. Boulton in his Introduction not unnaturally praises an enactment which as a legislator he had a part in passing. His notes are very full. An interesting conclusion he has arrived at is, that under sub-sect. 3 of sect. 5 the Court of Criminal Appeal will have the power to pass a more severe sentence than the one passed by the trial judge. This point is not noticed by Mr. Cohen or Mr. Morgan. The weak part of Mr. Boulton's work seems to us to be the Index, which is very scanty. For instance, we looked in vain for such headings as New Trial, *Venire de novo*, Corporal Punishment, Vacation.

Mr. Morgan's work is not so full as the other two we have noticed, but the Introduction gives an useful summary of the Act, and the notes throughout are adequate. None of these Authors has noticed what seems to us to be an error in Rule 25 *b*., where it directs that where a judge of the Court of Appeal refuses an application "the registrar on notifying such refusal to the appellant shall forward to him Form (XIII), which Form the appellant is hereby required to fill up, &c." On looking at the Forms it appears that Form (XIII) is merely the notification to appellant of the judge's decision, and that Form (XIV) is the Notice of Appeal from the judge which the appellant has to fill up.

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*The Laws of England.* Vol. II. London: Butterworth & Co. 1908.

This is the second volume of Lord Halsbury's great undertaking, and though the contents are divided into only four headings a

couple of them at least are very important. These headings are Bankruptcy and Insolvency; Barristers; Bastardy; and Bills of Exchange. Each of these titles has been supplied by very competent contributors. Those to the first heading are numerous, and consist of M. Muir Mackenzie and E. H. Tindal Atkinson, assisted by G. W. Chapman, R. Ringwood, J. R. V. Marchant, A. Romer Macklin, Herman Cohen, C. Tindale Davis, and M. R. Emanuel. The interesting subject of barristers is discussed by H. C. A. Bingley and J. R. V. Marchant. Bastardy by Sir Albert de Rutzen and A. W. Baker Welford. For the greater part of the article on Bills of Exchange, etc., Kenneth E. Chalmers is responsible, and it has been revised by Sir M. Dalzell Chalmers; but Part IV (Stamp Duties) has been contributed by F. W. Kingdon. It will be seen by this list how intimately most of the contributors are acquainted with their subjects by professional and official experience. The result of the labours of these learned men is a handsome, but, alas, very heavy volume of 580 pages of text, with nearly 160 more of Tables of Cases, Tables of Contents, Table of Statutes, etc. The Index also contains over 50 pages. The first heading is divided into Bankruptcy, Composition and Arrangements apart from the Bankruptcy Acts, and the Debtors Act, and covers over 350 pages. Although divided into parts, sections and sub-sections, the paragraphs under the heading are numbered consecutively, and the numbering is continued under the other headings all through this volume, so that the last paragraph of Bills of Exchange, etc., on page 579 is numbered 994. Bankruptcy itself consists of 603 paragraphs. The cases cited are all contained in the footnotes, so that we have here practically a code of the Bankruptcy law carefully compiled, arranged and annotated. The title "Barristers" is worth reading with care, as it contains information much of which is probably new to many barristers. Some of it is, as is pointed out in a prefatory note, not law but etiquette. There is a great deal of valuable information, but we think the statements as to the procedure on trials would have been better included under some other head. The subject of Bastardy is not a very important one. The law of Bills of Exchange is well set out in the last title with numerous references to the Bills of Exchange Act 1882 and the cases. Some points which one would expect to be included are not, but references are given to them as having been already considered in the article on Banking contributed to the first volume by Sir John Paget.

*Digest of Cases Over-ruled.* 3 Vols. By W. A. G. WOODS and J. RITCHIE, M.A. London: Stevens & Sons. 1907.

**Second Edition.** *Talbot and Fort's Index of Cases judicially noticed.* By M. R. MEHTA. London: Stevens & Sons. 1908.

We have here in three handsome volumes a work of the greatest utility, and one which could be produced only by almost incalculable labour. Its full title is "A Digest of Cases, over-ruled, approved, or otherwise dealt with in the English and other Courts." It starts from the earliest reports, and the Appendix includes the most recent cases down to the end of 1906. It is founded on Dale and Lehmann's well-known *Digest of Cases Over-ruled*. The cases are arranged in the form of an alphabetical digest according to their subject-matters, and the object is to show, not only how a particular case has been treated in later cases, but also how these have in their turn been handled. To facilitate this examination, in many instances short extracts from the judgments have been given. The plan has been adopted of having the case dealt with printed in heavy type, and the commenting case in light type. The value of the work may be partially judged by the statement that about 30,000 cases are dealt with; and the precaution is taken that no case is given as over-ruled unless a Court has definitely said so. There may be, probably are, some omissions, but we have not discovered them, and we have no hesitation in recommending the work most highly as indispensable to all who have to deal with Case law. It is not, we may point out, by any means exhaustive of the cases on Criminal law, though there are a certain number. It would perhaps have been better to point this out in the Preface. A good way to see how the cases are treated is to take a well-known one, such as *Hadley v. Baxendale*, which properly comes under the head Damages, and see the number of later cases given as commenting on it. The total number of pages in the text of the work is nearly 5,600, and there are besides over 200 pages taken up by the List of Cases. The Authors gratefully acknowledge their indebtedness to Mr. John Mews for his *Annual Digest*; constant reference to which will, we think, be necessary to keep this work up to date.

Mr. Mehta is unfortunate in issuing his edition of *Talbot and Fort's Index of Cases* at the same time as the more elaborate and complete work we have just mentioned; but being a piece of good work in itself, it will appeal to many who consider the other work too bulky, or too expensive. It is a list of all cases cited in judgments in the Reports from 1865 to 1905. The first edition was

published eighteen years ago, and the original work is much altered. There is no grouping of subjects, but the cases are given in alphabetical order with an abbreviation to show how the case cited was treated; most frequently this is simply done by the prefix of *ref.* The work seems to us, as far as we have been able to look into it, to have been thoroughly done; but we notice under *R. v. Lillyman* that the date of *R. v. Osborne* is wrongly given as 1895 instead of 1905, and no mention is made of several cases in which *R. v. Lillyman* was certainly cited.

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*The Annual Digest 1907.* By JOHN MEWS. London: Sweet & Maxwell. 1908.

*The Yearly Digest of Reported Cases 1907.* By G. R. HILL, M.A. London: Butterworth & Co. 1908.

Although these two useful Digests purport to deal with the same cases, namely, those decided or reported during the year 1907, still there are a good many differences. Some of these occur through the Editors selecting different cases from the Scotch and Irish Reports, but there are some English cases decided and reported during 1907, which are given in one Digest and not in the other, and the number of Colonial cases included by Mr. Hill is 24 against 19 given by Mr. Mews. Perhaps a careful examination of the dates of the decisions and reports might account for this. *R. v. Oliphant* and *R. v. Tideswell* make rather belated appearances in Mr. Mews' Digest, as they were both decided in 1905, and reported in the Law Reports for that year. *R. v. Payne* also was reported in the Law Reports 1906, as were *R. v. Murray*, *R. v. Linneker*, and *R. v. Bond*. Each of these Digests contains a useful List of Cases affirmed, reversed, &c.

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*The Law of Tender.* By G. L. B. HARRIS. London: Butterworth & Co. 1908.

If we had had to look up the law of "Tender," using tender in its most common legal sense as the tender of a debt, we should not have known where to search for it, beyond the excellent notes to *Bullen and Leake*, and the *Encyclopædia of English Law*. Mr. Harris has therefore we think supplied a real want in his exhaustive work. It is exhaustive, not only from the fulness with which it treats the species of tender we referred to, but also because it includes the consideration of many other species of tender which we should never have thought of, and to find a good account of the law of which

we should have been much puzzled. Some of these sorts of tender, such as "tender of evidence," "tender of conduct money," hardly come within the carefully wrought definition of that word which the Author, after dismissing with contempt the definitions of the "Black-letter Lawyers," offers us as follows : "an unqualified voluntary offer of continuing readiness on the part or on behalf of an obliger to perform a definite obligation, duty, or act of reparation, accompanied by production of the means of fulfilling the offer, made with the object of protecting the person making it against demands, penalties, or other consequences in excess of the offer, the actual performance being prevented by the refusal of the other party to accept the same." At the very beginning Mr. Harris is so enthusiastic about his subject that the grandeur of his language frightened us. He declares : "Tender, then, is one of those radiant gems of elemental justice which, drawn from the rude primordial judicatures of Barbarism, gleam with augmented lustre in the polished jural systems of the cosmic periods of law." However, in spite of this, we persevered and found that after a while he calmed down and treated his subject in ordinary, careful language. Tender is, as he truly states, a very technical defence, and we should think not many pleas of tender have been successfully made. We should expect that most pleas of tender have failed because they did not comply with the condition, that a tender must be made without condition or reservation. So strictly has this been construed that even asking for change or—before the Stamp Act 1891—for a receipt, has been held to render the tender invalid. The law and practice of Tender is most thoroughly examined and discussed in no less than sixteen chapters. Then comes Tender of Amends ; Tenders on various Contracts of Sale ; Tenders of Conduct Money ; last of all a variety of miscellaneous tenders, including Tender of Evidence, of Vadium, of Votes, and of Rates. The whole comprises a collection of useful and rather out of the way law, very thoroughly treated. A good instance of the thoroughness of Mr. Harris' work may be seen in the long list he gives of the various persons who may be entitled to tender mortgage money and redeem. Towards the end of the work the learned Author, cheered no doubt by the thought of having nearly finished his heavy task, enlivens his pages by references to various compelling processes as coming from the "cloistered twilight of the Central Office, the Crown Office, an Office in Chancery, or from the reluctant and ambulatory archive of a Clerk of Assize or

from a Clerk of the Peace," "emerging from mediæval shelves in Doctors' Commons redolent of an expired sacerdotalism," "issuing from the lugubrious lachrymary of the Coroner"; "expedited from the vigorous and aspiring County Court," or of an "Order of one of His Majesty's judges of the High Court descending from the pellucid altitude whence spring the fountains of justice."

*The Law of Hospitals.* By A. T. MURRAY. London: John Murray. 1908.

*The Law in General Medical Practice.* By STANLEY B. ATKINSON, M.A., M.B., B.Sc. London: Oxford University Press. 1908.

*The Diseases of Workmen.* By T. LUSON, M.D., and R. HYDE, M.R.C.S. London: Butterworth & Co. 1908.

The above three works have been reviewed together, not because they deal with an identical subject, but because, being written on medical subjects, law and medicine are largely intermingled; and also many of the same points are dealt with in some or all of them.

Mr. Murray deals in an attractive form with the history of Hospitals, King Edward's Fund, and the Principle of Mortmain. He classifies hospitals, treats of life and death in hospitals and all matters incidental thereto. This work shows careful study and an intelligent digest of the materials collected. We have placed clearly before us all the routine of hospital accounts, conditions under which those institutions must be built, endowed and carried on. We would point out, to one of the learned Author's accurate turn of mind, that Mr. L. S. Bristowe, to whom he acknowledges his indebtedness in the Preface, is Judge of the Supreme Court of the Transvaal, and not as therein stated.

Mr. Atkinson has a ready wit, which is displayed so early in his book as the Preface. We take it that this little treatise is primarily intended for the medical profession, for although professing a fair knowledge of medical jurisprudence, we must confess that a large portion of the text might just as usefully have been written in Chocktah for the amount of information that a mere lawyer can glean from it. Such gems as the following may possibly convey some startling pronouncement to the medical mind which is lost on the non-medical reader:—"A spontaneous abortion implies a pathological causation. It may result from an ectopic or a molar pregnancy." Again, "as with cystic disease of the chorion, acute hydramnios, etc." We must confess that the illustrative excerpts from the poets and prose writers, although unusual, certainly lend



point to the text. Mr. Atkinson's statement of law as to Defamation, Negligence, etc., are accurate and comprehensive, and his chapters on these subjects are full of hints useful to the medical profession. We should imagine that the learned author states many things which are part of the elementary education in medical schools, but no doubt he finds it necessary to do so in order to perfect the scheme of his work.

The Introduction by his Honour Judge Ruegg, K.C., is undoubtedly the part of *The Diseases of Workmen* which presents most interest to lawyers. Therein is presented a short history of the legislation which led up to the first Workmen's Compensation Act 1897, and latterly The Workmen's Compensation Act 1906. The weak points of both these Acts are severely criticised, and who better qualified to do so? The rest of the book deals with Diseases for which Compensation is payable under the Workmen's Compensation Act 1906, s. 8. As to any criticism on such a technical subject, we can only share the learned County Court Judge's inability to express any opinion.

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*The Companies Acts 1900 and 1907.* By P. F. SIMONSON, M.A. London: Effingham Wilson. 1908.

*The Companies Acts 1900 and 1907.* By J. W. REID. London: Effingham Wilson. 1908.

*The Companies Acts 1862 to 1907.* By W. GODDEN, LL.B., B.A., and STAMFORD HUTTON, M.A. London: Effingham Wilson. 1908.

*The Law of Limited Partnerships under The Limited Partnerships Act 1907.* By D. G. HEMMANT. London: Jordan & Sons. 1908.

**Tenth Edition.** *A Summary of the Law of Companies.* By T. EUSTACE SMITH and W. A. BEWES. London: Stevens & Haynes. 1908.

**Second Edition.** *Pulbrook's Responsibilities of Directors and Working of Companies under the Companies Acts 1862—1907.* By G. F. EMERY, LL.M. London: Effingham Wilson. 1908.

*An Everyday Guide for the Secretary.* By T. H. FRY and HOWARD DEIGHTON. London: Effingham Wilson. 1908.

*Laws relating to Foreigners and Foreign Corporations.* By G. F. EMERY, LL.M. London: Effingham Wilson. 1908.

Company law is a never-ending subject for law works, and the critic finds it hard to say something new concerning each book as it appears. There is also a fresh batch in addition to the regular stream whenever a new Act with reference to Company law is

passed. It is generally safe to divide these books into three categories, (a) Standard works, (b) Handbooks useful to the lawyer, (c) Handbooks primarily intended for laymen. None of the books under review would evidently come within category (a), which must necessarily be a small class, and be confined to exhaustive treatises by well-known authorities. Within category (b) might safely be placed Mr. Simonson's book on the Companies Acts of 1900 and 1907, in company with Mr. Hemmant's book on the Law of Limited Partnerships. Written by lawyers, for lawyers, in lawyers' language, they fully realise what is demanded of them.

The two handbooks by Messrs. Godden and Hutton, and J. W. Reid fulfil the requirements of category (c). The former has reached a second edition, which to some extent demonstrates its popularity.

To Mr. Eustace Smith, whose reputation as a Company lawyer is well known, the law student may look for safe guidance along the devious paths of the Company Acts. How safe that guidance, and to how many explorers it has been given, is manifest from the fact that his work has reached a tenth edition.

The Author of the first edition of *Responsibilities of Directors* being dead, the services of Mr. Emery have been requisitioned to bring out a second edition. As the legal adviser of many companies Mr. Pulbrook was keenly alive to the variety of information required by directors. He was doubtful whether the stringency of legislation on that subject would do more than prevent capable business men from being satisfied with the direction of companies, however sound might be the business principles upon which those companies were based, and experience almost makes one agree with this trenchant criticism. Mr. Emery has contented himself with merely bringing the law up to date.

*An Everyday Guide for the Secretary* is sure to be popular with officials of companies and have a large circle of readers among laymen. Written by Messrs. Fry and Deighton, the former has had much experience in writing handbooks for the people. The "Don'ts" respecting a Secretary's duties seem to cover the necessary ground, and act as danger signals to the most unwary occupant of that post.

Mr. Emery's little work, *Laws relating to Foreigners and Foreign Corporations*, will no doubt achieve the avowed object of showing the foreign trader how he stands in this country, what liabilities he incurs here, and what are his rights. We may be pardoned for

thinking that, as the book is intended for *foreigners*, the language used might have been a little more popular and less legal in its phraseology.

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*The Law of the Federal and State Constitutions of the United States.* By F. J. STIMSON. Boston: The Boston Book Company. 1908.

Mr. Stimson, who is Professor of Comparative Legislation in Harvard University, is to be congratulated upon having issued a work of unusual interest. Although intended, in the first instance, for the use of students at Harvard, it presents many attractions to a very much wider circle of readers. The clash between the Federal and State law is well known to students of American jurisprudence. Constitutional law has grown by leaps and bounds during the last twenty years, and Constitutional law has become, to use the picturesque language of the Author, "a live science." When one realises that there are forty-six States each jealous of their individual rights, it will be apparent how the contest between the local Courts and the Federal Courts must have intensified. If one may venture upon giving an opinion, it would be to say that, without in any way casting reflection upon the judiciary, the principle of elected judges does not make for independence from political influence. We think we are right in saying that all judges in the United States, whether Federal or State, are elected or nominated for a term of years. The one exception to this rule is the members of the Bench of the Supreme Court of the United States, who hold office for life, unless deposed somewhat on the same lines as the members of the English Judiciary. In Book I we have the origin and growth of the American Constitutions. Book II embraces the constitutional principles as expressed in the English Statutes of the realm and American Constitutions. The Author, in Book III, gives us the State Constitutions digested, annotated, and compared with the Federal Constitution. The Historical Digest of English Social Legislation is tabulated in chronological order from 1066 to 1906, although we do not quite follow why social legislation in the United States subsequent to 1776, the date of the Declaration of Independence, should be described as *English*. It is a welcome testimony to British writers to find that the Author has drawn inspiration from living authorities such as Dicey and Taswell-Langmead, whose *Law of the Constitution* and *English Constitutional History* respectively still hold a high

position in contemporary literature. Although Mr. Stimson disclaims all intention of writing for the practising lawyer, we fail to see why such an individual should not rank with the citizen and the student of politics for whom the Author states that his work is intended. We feel certain that the book, which undoubtedly is the result of much study and erudition, will prove attractive to a large circle of readers.

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*Year Books of Edward II.* Vol. IV. Edited for the Selden Society by the late F. W. MAITLAND and G. J. TURNER. London: Bernard Quaritch. 1907.

When reviewing Volumes II and III in May of last year, we regretted the loss to the Selden Society caused by the death of Professor Maitland, who was their Literary Director for so many years. In the present volume appears both his portrait and biography by the Honorary Secretary, in which it is stated that Professor Maitland had a very large share in the preparation of the volume under review. The Introduction gives a very excellent description of the judges of the time, the King's Bench, Common Bench, and the *Nisi Prius* system and the Civil. Some hundred and twelve cases are reported, about a fifth of which are from various terms of 3 Edward II, and the remaining four-fifths from Michaelmas term of the following year. The comments and language of Bereford, C.J., again strike one as distinctly funny. In the case of *Sylgrim v. Bishop of Hereford*, he delivers the following comment: "The men of Holy Church have a wonderful way! If they get a foot on to a man's land they will have their whole body there. For the love of God the Bishop is a shrewd fellow"! Again, in another case, the following remark is addressed to the learned Sergeant who was arguing the case. "Bereford, C. J. (in a rage addressing Laufer), 'At what moment of time does your count begin, you wicked caitiff?' (Laufer said no word)" and the silence of the learned Laufer was not surprising! The following naive entry by the Reporter possesses considerable merit. "Afterwards John of Berneval died pending the plea. Thus death solves all things." Apparently there was a limit to the endurance even of John of Berneval. As is usual, the "get up" of the present volume is attractive, and even if its contents are not of great assistance to the practitioner, at any rate they present considerable interest to the student of historical jurisprudence. Furthermore, these records reflect in accurate form the ideas and customs of our Courts in ages long ago.

**Second Edition.** *The Law relating to Income Tax.* By A. ROBINSON. London: Stevens & Sons. 1908.

Mr. Robinson has divided his subject into three main divisions: I, Creations of Officials; II, Procedure; III, Schedules. The most important of these to the profession, and the public, is Part III. There is also a Part IV, which, though short, is important, as it deals with "persons to be charged." We think our readers will be inclined to agree with part of an extract from the twenty-eighth report of the Commissioners of Inland Revenue which Mr. Robinson quotes. "Of all the taxes under the control of this Board there is none which can compare with the property and income tax, or, as it is popularly called, the income tax, in respect of the difficult questions which arise in its administration. The tax affects a much greater number of persons than any other direct tax, and as the charges imposed by it are so heavy, it is no wonder that they are keenly scrutinised." One of the most difficult questions, and a fertile source of litigation, has been in connection with what we may call "foreign companies or businesses." Mr. Robinson deals with these under Schedule D. "Cases depending on the Conduct and Management of the Trading Adventure," and discusses all the cases from *Cesana Sulphur Co. v. Nicholson*, in 1876, to *Kodak Limited v. Clarke*, and *Gramophone and Typewriter Limited v. Stanley*, in 1903 and 1906. Up to the time of *Colquhoun v. Brooks*, the decisions tended in favour of the Crown, and after that case had been explained in *San Paulo Railway Co. v. Carter*, the cases were again adverse to the tax-payer, until the tide once more turned in *Kodak Limited v. Clarke*. Still, however, the law is not in a satisfactory state; owing to the form of procedure, the companies seem sometimes to be almost stated out of Court by the Commissioners, and have, like the Kodak Company, to resort to complicated tactics to get the case stated so as to fairly raise the question in dispute. The moral is "what is true in all income tax cases, *i.e.*, the necessity of marshalling the facts and carefully defining the points of law before the Commissioners. By great care over these matters, and by this alone, can the appellant hope, in a complicated case, to have his argument properly placed before the High Court." We think we have quoted enough to show how practically and acutely Mr. Robinson deals with the cases. The Index does not seem as full as we should like. We have been unable to find a reference in the Index to the cases referring to subscriptions, grants from

societies, and Easter offerings given to clergymen, though all the cases are given under Schedule E, Rule 4, and on looking again after having found them, the only reference we could find to the page was the single word "Emolument."

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**Second Edition.** *The Law of Copyright in Designs.* By LEWIS EDMUNDS, D.Sc., K.C., and H. BENTWICH, LL.B. London: Sweet & Maxwell. 1908.

*The Law and Commercial Usage of Patents, Designs and Trade Marks.* By K. R. SWAN, B.A. London: Archibald Constable & Co. 1908.

*The Patents and Designs Act 1907.* By W. M. FREEMAN. London: Horace Cox. 1908.

*The Statute Law relating to Patents of Invention and Registration of Designs.* By J. W. GORDON. London: Jordan & Sons. 1908.

The old days when the Crown was enabled to grant a monopoly in the manufacturing of any particular thing to a Court favourite are now passed. A large body of law which has grown up since the time of the Stuarts, when this abuse reached its zenith, has protected the rights of the subject not only in England but also in foreign lands. Patent law has always found an able exponent in Mr. Lewis Edmunds, and students and practitioners in that branch of law always welcome any work bearing the imprint of his authorship. Whilst the present edition was in course of preparation, Mr. Lloyd George brought in and passed his famous Patents and Designs Act 1907. This Act not only consolidated the then present law, but introduced many important modifications. Notable among these modifications was the one which extended the term of protection from five to an optional fifteen years, and gave enlarged rights and advantages to all registered owners. How far-reaching this innovation was in its scope is apparent when we state that in 1907 more than twenty-six thousand designs were registered. The new Act affected the design of the work under review to a very considerable extent. Great alterations in the text were rendered necessary, in fact it entailed a complete revision of the whole treatise. This important duty was entrusted to Mr. Bentwich, and well has he acquitted himself of the task. The whole of Part I is divided into sections which state the law and rules of practice in large type. In a smaller and heavier type are given the cases upon which the state-

ments in the particular section are based. Part II is made up of a comparison between the new Patents and Designs Act 1907, and the repealed Patents, Designs and Trade Marks Acts 1883—1888, so far as these repealed enactments deal with Designs. Also is comprised, the Designs Rules 1908 and the International Convention for the protection of Industrial Property, which was signed at Paris in the year 1883. Part III, Appendix A, gives a List of Statutes repealed and replaced by the Consolidating Act of 1883; and then are set out in full the Statutes between 1883 and 1888. A very excellent and comprehensive set of Forms of Pleadings and other proceedings in Actions is given, which will be found to be of great practical utility. A somewhat startling innovation is to be found in illustrations of designs and the alleged infringement, and we fear that some of those chosen will be a source of amusement, not to mention ribald comment, on the part of any frivolously-minded reader. The Index is very excellent and complete.

Mr. Swan's book is intended for the layman, and to such it will undoubtedly appeal, although the language employed by the Author is sometimes somewhat involved for that class of reader. It is one of a series of works which is called the "Westminster." The Index is altogether too crowded up, but that is the fault of the printer and not of the learned Author. Generally speaking, the work is based upon an excellent model.

The work of Mr. Freeman is intended to be a treatise on the new Act for the guidance of students. As Chairman of the Patents, Designs and Trade Marks Committee of the Birmingham Chamber of Commerce, his work will bear the impress of practical experience.

Mr. Gordon disclaims all intention of writing a code of the Statute law relating to Patents for Inventions and Registered Designs. He has left out of the scope of his work the Common law and the Case law relating to his subject, and has contented himself with dealing with the principal points of the new Act, pointing out their novelty and importance. His analysis of the new Act is of more than passing excellence, and this work, though not of large size, may safely be recommended to any student or practitioner who wishes to become conversant with its intricacies. The whole "get-up" and scheme of this little treatise is attractive both in form and style of writing, and as the author of kindred works, Mr. Gordon is well qualified for the work he has undertaken.

**Third Edition.** *Negligence in Law.* 2 Vols. By THOMAS BEVEN. London: Stevens & Haynes. 1908.

The first edition of this book attained at once the character of a scientific, accurate and thoughtful study, of that complicated question the law of Negligence, and subsequent editions have only increased that reputation. We know no legal work in which cases are examined and analysed with more knowledge, skill and courage, than in this one by Mr. Beven. As an instance, take his examination of Lord Halsbury's judgment in *Scholfield v. Earl of Londesborough*, and particularly the part where that noble and learned Lord invites the other Lords to over-rule *Young v. Grote*; to which invitation, in Mr. Beven's opinion, they did not respond. The conclusion he comes to about the *Colonial Bank of Australia v. Marshall* is, "that the statement there made, that 'the duty which according to the ruling of the learned Chief Justice subsists between customer and banker is substantially the same as that contended for in *Scholfield v. Earl of Londesborough*,' is as accurate in law as it is in fact." The last edition was published in 1895, and the present one is much altered. It has not only been brought up to date, but presents "a considerable body of new problems and conclusions," owing partly to the fact that "the increasing complexity of social relations in modern life accentuates immensely the occasions of conflict, whether intentional or not, between those whose interests or rights are converging but not identical." New cases to the number of 1465 have been introduced, and it is not surprising to learn that the preparation of this edition has taken up a very large proportion of the Author's time during the last three or four years. It is pleasant to hear Mr. Beven say that he has used "considerable freedom in inquiring into the validity of the decisions arrived at." He certainly has, and speaks with indignation of the attempt of Williams, L.J., to dismiss his beloved *Young v. Grote* in a parenthesis. A large portion of the work has been re-written; for instance, the chapters on Corporations and Local Bodies, the Occupation of Property, Common Carriers by Water, and on Collision on Water. The whole of Book VII, on Unclassified Relations, which includes Partnership, Trustees and Executors, Bankers, and Estoppel, has also been re-written. In many other chapters considerable alterations have been made. New subjects which have been dealt with are the procedure under the Public Authorities Protection Act 1893, and the Motor Acts. It



will be both interesting and instructive to give Mr. Beven's opinions on the liabilities of motors. He points out that the Common law rights and liabilities are quite unaffected. The duty on the driver of the motor car is increased the more powerful the engine is, "for the duty to use care increases in proportion to the danger involved in dealing with the instruments which for a man's own purposes he brings into relations of proximity to his neighbours." "On the other hand, the change in ways and customs of using the highways must act on the standard of care of passengers. A person crossing the road in front of an oncoming motor with a clear course, must take that into account and not leave a margin that would only be sufficient to admit of crossing in front of a lame donkey drawing a costermonger's barrow." He then proceeds to deal with a prevalent error, "through the ill-considered decisions of certain County Court judges," that the skidding of a motor vehicle is alone enough to fix liability for accident on its owner. There is no liability without negligence and a motor or bicycle is only liable for accidents caused by skidding either on the ground of negligence or nuisance, unless it is proved that there is a tendency to skid under normal circumstances. "It is plainly incompetent for any judge without evidence to rule that a motor is either dangerous or a nuisance." With all respect to Mr. Beven we think a great many persons, who are not judges, do both. The only chapter left unaltered is that on Duty to Answer for One's own Acts, and there Mr. Beven has by no means altered his opinion of *Stanley v. Powell*, or of the judgment of the learned judge who decided that case. To make room for new matter, the discussion of several important cases has been compressed and also, we fear with reluctance, some long notes have had to disappear. Another important change has occurred from the Author coming to the conclusion that it is impossible satisfactorily to range and compare the American and English system, both on account of the great bulk of the American decisions and also from the fact that "American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel but fundamentally unsound." Of this he gives some illustrations. The first is an amusing case in which a female passenger recovered heavy damages against a railway company whose guard kissed her against her will. Some 300 or 400 American decisions have in consequence dropped out, and have been replaced to a certain extent by Colonial decisions. It is very satisfactory to

read the appreciative terms with which one so well qualified to form an opinion as Mr. Beven alludes to our Colonial judges.

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**Third Edition.** *The Law of Nuisances.* By E. W. GARRETT, M.A., and H. G. GARRETT. London: Butterworth & Co. 1908.

Besides the addition of some 400 cases decided since the last edition was published in 1897, the Authors have had to make very considerable additions to the Statutory Appendix. Perhaps the most important of these is caused by the Motor Car legislation. Under the Common law excessive traffic was indictable as a nuisance, and now "excessive traffic has taken new forms in excessive speed, smoke, noise, etc., all of which come directly under the head of nuisance, as contributing an interference with the free and uninterrupted use of the highway, by causing danger or inconvenience to the public in the exercise of the Common law right." These additions are the Locomotives Act 1898, under sect. 12 of which some very important cases have been decided; the Motor Car Act 1903, on the construction of which there are about ten reported cases; the Motor Car Order 1903, the Motor Car Order 1904, the Heavy Motor Car Order 1904, the Locomotive Construction Order 1905, the Heavy Motor Car (Amendment) Order 1907, the Petroleum Order 1907, Petroleum Regulations 1907. Perhaps also the Lights on Vehicles Acts 1907 may also be included under this head. The law dealing with the adulteration of foods and drugs, a subject very frequently before magistrates, has also been modified to some extent by the Sale of Food and Drugs Act 1899, the Butter and Margarine Act 1907, and the regulations as to the sale of milk and butter made under the first of these two Acts. Other additions are, the Street Betting Act 1906, the Dogs Act 1906, and the Dogs Act Rules 1906. We notice *Smith v. Giddy* is cited without having applied to it the destructive criticism which we find in Mr. Beven's book.

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**Fourth Edition.** *The Principles of Equity.* By H. A. SMITH, M.A., LL.B. London: Stevens & Sons. 1908.

It is five and a-half years since Mr. Smith issued the last edition of his very practical treatise. We have looked up several subjects in it and found them treated very clearly and satisfactorily. There are a considerable number of new cases added, some of them, such as *Colls v. Home and Colonial Stores*, of very considerable importance.

But the most important alterations are those caused by legislation. The passing of the "voluminous" Companies' Act 1907, has operated with other causes to induce the Author to omit the chapter on Company law, though "the contents of the deleted chapter have been distributed under their appropriate headings in different parts of the work," in so far as they conspicuously illustrated the application of legal principles. There are several references to the Married Women's Property Act 1907, and the Limited Partnership Act of the same year. Mr. Smith calls attention to the very curious instance of legislation connected with the Patents and Designs Act 1907, which "repealed *ab initio* the Patents and Designs Amendments Act which received the Royal assent on the same day. An Act which receives still fuller notice is the Public Trustee Act 1906, to which more than five pages are devoted. The pages on investment might be read with profit by other than lawyers.

**Fourth Edition.** *The Duty and Liability of Employers.* By His Honour Judge ROBERTS, G. WALLACE, M.A., and A. H. GRAHAM, M.A. London: Butterworth & Co. 1908.

Over twenty years have elapsed since the publication of the third edition of Messrs. Roberts and Wallace's treatise, a very unusual interval between two issues of a successful book. The reason is, that the learned Authors have been waiting for the passing of a more permanent and comprehensive measure than the Workmen's Compensation Acts 1897 and 1900, and so waited for the Act of 1906. The scope of the present work has been enlarged to meet the Author's view "that a true apprehension of an employer's position at Common law and under the statutes cannot be arrived at without a proper understanding of his duty to the public at large." The present edition "is an attempt to explain exhaustively, and in due sequence the principles of all the liabilities of an employer for injuries to person or property." The result of this laudable determination is, however, an appalling increase in bulk. We should say the present edition is quite twice as large as the last. Some increase was, however, inevitable after the Act of 1906. Many subjects are treated fully which do not seem to us to have much to do with employers as such. For instance, in the important chapter on the effect of death on rights of action, a good deal of the argument has no direct connection with employers or their liabilities. What, for instance, has *Twyecross v. Grant* got to do with it? We would not say

that the learned Authors are ever irrelevant, but with every respect for their thoroughness and ability, they deal with questions so very fully that the book has become somewhat heavy. It is worth calling attention to their disagreement with the decision in *Pullen v. G. E. R. Co.* The part of the book which we have read with most interest is the discussion of the meaning of those doubtful words in the Act of 1906 "workman" and "casual." They consider that the words "has entered into or works under a contract of service with an employer" clearly require that the "workman" must stand in the relation of servant to the employer. They do good service by first explaining the distinction between "has entered into" and "works under." They truly point out that the question whether there is any implied contract of service where there is no remuneration is generally only of academic interest. Then as to "service," they consider the primary question is whether the employer has a power of control. This, though very important, is not conclusive, as they point out the cases of parish clerks and sextons, who when they hold freehold offices are not servants though under control. A very important principle they lay down is, that if "the main purpose in employing a person was to get the benefit of his special attainments as distinguished from his services, the case is not one of employment as a workman even though he may have to discharge some of the ordinary duties of a workman." They think that the headmaster in a public elementary school, a highly-trained singer or organist, is not a workman. In a case which has often been mooted, namely, that of a curate, their opinion is specially worth noticing. They say, "Even if the limited control exercisable by the incumbent over the curate can in any way be considered as sufficient to justify the conclusion that the relation of master and servant exists between them—which is extremely doubtful—it is submitted that inasmuch as a curate, by virtue of ordination and the licence of the Bishop, occupies the status of assistant-minister in the parish in which he officiates, he cannot be said to work under a contract of service within the meaning of the Act. "Casual" is treated very shortly and is merely opposed to "regular." The only illustrations are waiters and golf caddies. The Acts given in the Appendix are the Fatal Accidents Acts 1846 and 1864, The Employers' Liability Act 1880, and the Workmen's Compensation Act 1906. There are also the Rules, Regulations, etc. We also find the general observations of Cozens-Hardy, M.R., in *Perry v. Wright*.

**Sixth Edition.** *Archbold's Quarter Sessions.* By F. R. Y. RADCLIFFE, K.C. London: Butterworth & Co. 1908.

It would have been hard to find one more competent to bring out a new edition of *Archbold* than the present Author. Of wide experience in criminal cases, his knowledge is increased by the fact that he is Recorder of the important city of Portsmouth. The general scheme of the present edition is based upon that of the fourth, although many alterations have been found necessary. Two important changes, however, have been made. In the first instance, in the place of the forms being incorporated in the text, they have been collected in appendices at the end. In the next place, there have been substituted simple lists of the various Statutes under which an Appeal lies, and of the various Indictable Offences triable at Quarter Sessions. The lists are in place of the old Table of Procedure on Appeals and the Table of Maximum Punishments, etc., for Crimes, which appeared in the fourth edition. No doubt these alterations will be considered improvements. Many new forms have been added, notably those dealing with the Diversion of Highways. The learned Author believes that these will be found nowhere else, and they are presumably due to the assistance of the numerous gentlemen holding official positions, to whom thanks is rendered in the Preface. Very complete tables of cases and Statutes appear at the beginning; these have been thoroughly re-written by Mr. Edward Symons. The much-discussed Criminal Appeal Act of 1907 (7 Edw. VII, c. 23), together with Rules made thereunder, appears in the Appendices. It will be interesting to see how soon the rapidly appearing decisions under this Act will necessitate a new edition. The Index is very complete and illuminating of the Text. In conclusion, one may state that Mr. Radcliffe has produced an edition both worthy of his own reputation and that of the original Author of this standard work.

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**Eighth Edition.** *Gale on Easements.* By R. ROOPE REEVE. London: Sweet & Maxwell. 1908.

In the first edition of this work, published in 1839, the Author represented as one of the difficulties which stood in his way, "the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law." Anybody who now looks at the Table of Cases appended to the present edition, numbering we should think, about 1,500, will be of the opinion

that that reproach at any rate has been taken away from our law. A good many cases have been decided since the issue of the last edition, most of them, we think, in connection with the right to the easement of light. The most important of these is *Colls v. Home and Colonial Stores*, in which the House of Lords, reversing *Warren v. Brown*, decided, as explained by Farwell, J., in *Higgins v. Betts*, that the question to be decided in cases of interference with an easement of light is "nuisance or no nuisance," and whether the amount of light left is "enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind." This seems a satisfactory basis, as it puts it "on the same footing as other cases of nuisance." *Ambler v. Gordon* has decided a much-discussed question as to whether the owner of a tenement can acquire, by enjoyment, a prescriptive right to an extraordinary amount of light. This, Bray, J., has decided in the negative. Some important cases have also been decided in favour of the right of support against claims to work minerals; namely, by the House of Lords in *New Sharlston Collieries Co., Ltd. v. Earl of Westmoreland*; *Clippens Oil Co., Ltd. v. Edinburgh and District Water Trustees*; *Butterknowle Colliery Co., Ltd. v. Bishop Auckland Industrial Co-operative, Ltd.*; and *Manchester Corporation v. New Moss Colliery, Ltd.* Another House of Lords case, *Morgan v. Fear*, has decided "that a right to light may be absolutely and indefeasibly acquired under sect. 3 of the statute [2 & 3 Will. IV, c. 71], so as to be permanently annexed to the dominant tenement as against the servient tenement by twenty years' enjoyment without interruption, even though during the whole period the dominant and servient tenements are held under lease by different lessees under a common landlord." We think we have said enough to show how urgently a new edition was required to bring the law on this important subject up to date, and we are pleased to find how well the necessary alterations and additions have been done. Mr. George Cave, K.C., the Editor of the last two editions, was to have collaborated with Mr. Reeve on the present occasion, but was compelled to withdraw from the task before it was completed. Mr. Reeve expresses his indebtedness to him for assistance in certain parts of the work, including the chapter on Light. The additions to the original text are distinguished by being inclosed in square brackets.

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**Ninth Edition.** *Williams' Bankruptcy Practice.* By E. W. HANSELL, M.A., assisted by A. R. MACKLIN, LL.B. London: Stevens & Sons. 1908.

**Tenth Edition.** *The Principles of Bankruptcy.* By R. RINGWOOD, M.A. London: Stevens & Haynes. 1908.

Only a short time in the life of an established law book has elapsed since the issue of the last editions of both these well-known works, Mr. Hansell having published his in 1904, and Mr. Ringwood his in 1905. There has been no important legislation on the subject, though some of the recent statutes, such as the Workmen's Compensation Act 1906, and the Limited Partnerships Act 1907, have to be referred to. As regards the former Act, we can find no reference to it in Mr. Ringwood's Index. We find it in Mr. Hansell's as the Workman's Compensation Act. The number of new cases decided since their last editions has no doubt influenced the Authors to bring out the present ones. Mr. Ringwood states that he has added 75 cases, and we should imagine the number added by Mr. Hansell to be rather larger. Many of these cases are of considerable interest and importance. For instance, in *In re Button ex p. Haviside* the Court of Appeal has decided that the true owner of goods entrusted to the bankrupt for sale and in his possession at the commencement of the bankruptcy, in such circumstances that they passed to the trustee under the reputed ownership section, is entitled to prove for the value of the goods. In *In re Hall ex p. The Official Receiver*, the Court of Appeal distinguished *Ex p. James* and *In re Tyler*, and held that the fact of the mortgages being unfamiliar with the law of Bankruptcy did not impose on the Official Receiver as trustee any obligation to recoup the mortgagees. A *dictum* of Vaughan Williams, L.J., in *Hedges v. Preston* is explained and distinguished in *In re Saumarez ex p. Salaman*; and *Ex p. Hornby* and *Stammers v. Elliott* were also explained and distinguished in *In re West Coast Goldfields Limited*. To show how very much up to date both works are, we may call attention to the fact that in both *Lister v. Hooson*, reported in the present year, is cited. Of other cases reported this year, Mr. Hansell cites *In re Van Laun ex p. The International Assets Co. Ltd.*, and *Lord's Trustee v. G. E. Ry. Co.*, while Mr. Ringwood gives *Pearce v. Bullard*. A certain number of new rules, and amendments to old ones, will be found. The method and scope of

these two books is probably well known to all our readers. *Williams on Bankruptcy* is a complete and exhaustive work on the Law of Bankruptcy, in the form of an annotated edition of the Bankruptcy Acts. Mr. Ringwood's is a treatise on the Principles of Bankruptcy, full enough to be of great practical use, but in a form which is well adapted to the use of the student.

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**Eleventh Edition.** *Harris's Principles of the Criminal Law.* By C. L. ATTENBOROUGH. London: Stevens & Haynes. 1908.

Although the last edition was published as recently as 1904, a fresh one has been found necessary. This is a striking proof that this treatise has a very large circle of readers, chiefly, we should think, among law students, to whom it should specially appeal. Since the last edition many important Acts affecting Criminal law have been placed on the Statute Book. The Aliens Act 1905, and the Prevention of Corruption Act 1906, afford plenty of scope for judicious treatment. Also the Probation of Offenders Act 1907 is a daring experiment in legislation. This Act gives the Court power, not only of binding over for three years any person convicted on indictment having regard to their antecedents, but also of ordering the offender to pay compensation. A good deal of criticism might rightly be passed on this new channel for supervision by the police, a supervision which leaves much to the discretion of the officer exercising it, and which has laid the system open to much invidious comment. The high-water mark of novelty has been reached by the power given to a Court of ordering a parent or guardian of the offender, under sixteen, to pay compensation and costs if it appears to the Court that such parent or guardian has conduced to the commission of the offence. If the principle of punishing individuals not directly charged with the offence is once admitted, it is hard to see where there is likely to be any finality. Although it can readily be perceived that these new powers will do much good, it is quite possible for the benefits to be more than equalled by the amount of hardship which can be inflicted. However, we live in a humanitarian age when crime is treated on the same lines as a doctor deals with disease, so that whatever misgivings one may feel, a critic must fall in with the trend of modern thought. The text of the new Criminal Appeal Act 1907 is given in the Appendix, but the new Rules of Court made thereunder are totally omitted. What good can it be to the practitioner to know that there is an appeal if no method



is given of the way to make such appeal? We certainly think that this fault should be remedied in any future edition. The Table of Offences is very well worked out and the Index complete. The present edition will undoubtedly occupy the same high position that former ones have occupied in the past.

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**Thirteenth Edition.** *Roscoe's Criminal Evidence.* By HERMAN COHEN. London: Stevens & Sons. 1908.

We have always preferred *Archbold* to *Roscoe*, as being more useful to practitioners, but there is no doubt as to the high qualities of the latter, and the position it has held since it was first published in 1835. We believe this is the first year of Mr. Cohen's editing, and as might be expected, his work is careful and thorough. He has been skilful enough to gain space by a variety of methods, such as the excision of obsolete case-law; of "redundant matter and accretions;" by the citations of reports in one passage only; by an abbreviated notation of Acts of Parliament; and by leaving out the abbreviation *R. v.*, in the title of criminal cases. The space gained by these ingenious devices he has utilized to add the dates to all the cases cited and a few new subject-sections. As an instance of the care and labour bestowed in bringing the work up to date, we can refer to the citation of *R. v. Warren* decided as lately as October, from a MS. note of Bosanquet, C.S. We have nothing but praise for the manner in which the work has been revised, but we have noticed a few omissions. There is no reference to *R. v. Hotine*, a rather important ruling in 1904 on the Larceny Act 1901. We have not been able to find sufficient information as to how to prove registers of births, deaths and marriages abroad, nor any reference to *Lyell v. Kennedy* or *Brinkley v. Attorney-General*. We hope that in the next edition Mr. Cohen will see his way to grouping the statutes under their respective years, and giving their short titles. It would often save much trouble. We notice with satisfaction the appreciation shown of Professor Kenny's *Outlines of Criminal Law*. We were anxious to see how Mr. Cohen would deal with the debatable question as to whether death caused by an illegal operation was murder, but have not been able to find any reference to *R. v. Whitmarsh* and the other cases recently decided on that point.

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## CONTEMPORARY FOREIGN LITERATURE.

*L'Identification des Récidivistes.* By Dr. E. LOCARD. Paris: 1908.

All modern systems of identification are examined, those of Berthillon and Reiss especially. The latter authority is called by the author "*la vivante incarnation du moderne Sherlock Holmes.*" The Tichborne case is set out at some length on page 7 as an example of the difficulties which may beset an apparently simple question of identity. Dr. Locard is in favour of an international system with "*un office identificateur international.*" Probably this would savour too much of what we are accustomed to call Continental police methods to make it acceptable in England.

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*Peine de Mort et Criminalité.* By A. LACASSAGNE, Professor of Legal Medicine at Lyons. Paris: 1908.

This and the previous book noticed are volumes of the *Bibliothèque de Criminologie*, Professor Lacassagne being the editor of the series. One or more have been already reviewed in this Magazine, especially *La Servante Criminelle*. The professor is strongly in favour of retention of the death penalty. The only reform he would make is to increase the certainty of the sanction by not allowing it to be diverted by popular clamour or the misplaced humanity of the State.

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*Le Blocus Maritime.* By NILS SODERQVIST. Stockholm: 1908.

A thesis for the doctorate at Upsala. It appears to include all that can be said on the subject, especially with regard to history, and is made additionally interesting by the appendices. These are mostly reprints from documents in the Riksarkiv at Stockholm going as far back as 1342. They are probably unattainable in any other printed work.

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*Die Geschichte des englischen Pfandrechts.* By Dr. H. D. HAZELTINE, Reader in English Law at Cambridge. Breslau: 1907.

This is Vol. XCII of the *Untersuchungen*, edited by Dr. Otto Gierke, and so far Dr. Hazeltine appears to be the only English or

American contributor to the series. He shows his knowledge at once of the German language and of the English law of pledge and mortgage, a quite unusual combination. The historical treatment of the subject manifests profound learning and an intimate acquaintance with the writings of the great German authorities, such as Liebermann, Brunner, and Gierke. In addition to these, citations are made from recondite English authorities, such as the Abingdon Rolls and the publications of the Surtees Society. There is a valuable and carefully compiled appendix of charters, decisions, statutes, and forms from the year 804 to 1374.

*A Systematic List of the Principal Continental Law-Literature published during 1907.* The Hague: 1908.—A most valuable and complete bibliography, including collections of statutes, reports, and articles in periodicals as well as text-books.

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#### PERIODICALS.

*Journal du Droit International Privé.* Nos. III—IV. Paris: 1908.—The sketch of private International law as administered in Greece is very interesting, if only for the mention of text-books of which the very names are unknown in this country. There is also an article on the application of *renvoi* by the Courts in Portugal. The Court of Appeal has the somewhat remarkable title of *A Relação de Lisboa*. A long discussion on the *clause de viduité* in a will refers to several English decisions. The point is the validity of the clause where it is good by the law of the country of the testator, but not by the law of the country of the widow, to which she reverts on widowhood. The laws of different nations are not in accord on the matter. In view of certain English decisions, a case before the Court of Appeal at Florence in 1907 will repay perusal (p. 601). The Court held void the marriage of an Italian under twenty-five to an English-woman in England, where the consent of the minor's ascendants had not been obtained. It is to be noticed that the Court did not regard the marriage as void *ab initio*. Apparently it held good until annulled by the Court at the instance of the person or persons whose consent ought to have been obtained.

*Zeitschrift für Internationales Privat- und Öffentliches Recht.* Vol. XVII, parts 4 to 6. Leipzig: 1907.—Herr H. Wittmaack discusses the English law of extradition, and compares it with the law of the German Empire as contained in the *Strafgesetzbuch*. The documents relating to the Second Hague Conference of 1907 are fully set out, and its results are summed up by Professor O. Nippold of Berne. Dr. Nippold of Vienna examines the position taken by the Hague Convention of 1902 towards marriage in its international relations.

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*Deutsche Juristen-Zeitung.* 1 April—15 June. Berlin: 1908.—An article by a Limburg judge with the title *Wahrheit und Dichtung* rather belies its title. It has nothing to do with Göthe or poetry, but is an essay on law reform. The law in Germany—and in England too—is, in the learned writer's opinion, too much in the nature of *Klassenjustiz*, or class legislation. The new bourse law of 8th May last is criticised by Dr. Weber. Professor Liepmann of Kiel agrees with many in this country that examinations are not always the best tests of the efficiency of students of law. He would have no condition for entrance to the legal profession beyond attendance at a certain number of seminars and favourable reports of the professors or readers.

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*Giustizia Penale.* 19 March—11 June. Rome: 1908.—If a man fell trees to which he reasonably but wrongly thinks he has a right, he is guilty not of larceny, but of attempted larceny (p. 376). This would surely not have been so decided in England. At p. 503 is a report of the *Causa Kingsland* before the Court of Appeal of Modena on March 12th this year. The case has been much discussed in Italy. It was held that a charge of assault against a captain of cavalry for striking with a sabre a person not taking an active part in a riot was within the exclusive jurisdiction of a military tribunal. There are several decisions on the construction of the term *domicilio coatto*, one to the effect that the breach of it is an offence, although the facts on which it was imposed are denied.

JAMES WILLIAMS.

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Books received, reviews of which have been held over owing to pressure on space :—Stephens' *Charter-Parties*, and *Bills of Lading*; Dicksee's *Bookkeeping for Company Secretaries*; Fraser's *Law of Torts*; Davey's *Poor Law Settlement and Removal*; Robertson's *Civil Proceedings for and against the Crown*; Fletcher's *Registration of Electors*, Strahan's *Law of Property*; Topham's *Real Property*; Atlay's *The Victorian Chancellors*, Vol. II; Whittuck's *International Documents*; Macnamara and Robertson's *Law of Carriers by Land*; Hearnshaw's *Leet Jurisdiction in England*; Takahashi's *International Law applied to the Russo-Japanese War*, Campbell's *Ruling Cases*, Vol. 27; Launspach's *State and Family in Early Rome*, Wilshire's *Analysis of Williams's Real Property*; Rothenbücher's *Die Trennung von Staat und Kirche*; Martin's *Land Laws of New Zealand*, Thomas's *Leading Cases in Constitutional Law*; Wood and Johnson's *Encyclopedia of Local Government Board Requirements and Practice*; Emanuel's *Law of Dogs*; Champernowne, Johnston and Bridge's *The Public Trustee Act 1906*.

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Other publications received :—Kime's *International Law Directory 1908*; Smith's *Jurisprudence* (Columbia University Press); Funeral of Sir H. Lawrence (photograph), (Press Photographic Agency); *The Bibliophile*, No. 4; Smith and Williams's *The Licensing Bill*.

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The *Law Magazine and Review* receives or exchanges with the following amongst other publications :—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.

# THE LAW MAGAZINE AND REVIEW.

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No. CCCL.—NOVEMBER, 1908.

## I.—HUNGARIAN LAW.<sup>1</sup>

IN giving a hearty welcome on the part of the Association of Hungarian Jurists and on my own part too, to the distinguished guests visiting our country, I desire to fulfil an obligation which is the fundamental condition of any intercourse between hosts and guests, that viz. :—of *introduction*.

It is true that, as a rule, it is the foreign guest who introduces himself: for he knows whom he is visiting, whereas the host is not as a rule acquainted with the identity of his guest. In the present case, however, it is just the reverse. You who have come from Great Britain, France, Germany etc., do not require to enlighten us about your countries and their respective institutions: in fact we should be liable to be accused of a want of erudition, did we not know you and your respective countries. On the other hand, unfortunately, we cannot presume that our own country and its peculiar institutions are as familiar to you as yours are to us; in fact we have often been obliged to recognise that the ideas entertained abroad concerning the conditions of Hungary are anything but correct, and that on this point very erroneous conceptions have been circulated. This is

<sup>1</sup> An address delivered at Budapest on the 22nd September, 1908, at the 25th Conference of the International Law Association.

particularly the case with our *legal institutions*: and that is the reason why I have begged for permission to offer some information concerning our legal institutions to the members of that association whose particular calling it is to encourage international intercourse and further mutual acquaintance in the field of law, and which has honoured us so deeply by choosing the Capital of Hungary as the scene of its this year's conference.

The erroneous conceptions to which I have referred, are undoubtedly a result of the peculiar political relations of Hungary and Austria, which act indirectly upon the international position of the former country. The fact namely, that Hungary and Austria are ruled over by one and the same Monarch, and that the "personal union" involves a certain community of government—(*e.g.*, in military affairs and questions of foreign politics) in consequence of which community, Hungary does not as a rule appear in international relations independently, but in union with Austria, as "*Austria-Hungary*," or the "*Austro-Hungarian Monarchy*,"—has given rise to the erroneous conception that Hungary is not an independent sovereignty, and does not possess absolute legislative and executive power of her own. She is, in fact, believed to be merely a subordinate part of the Monarchy (considered as one sovereign unit), endowed at the most with a certain kind of self-government, a province like either Bohemia or Galicia, from which she is distinguished merely by the form and scope of her autonomy. This erroneous conception is all the more difficult to remove, as on the one hand past history, in the days when the name of Hungary did not even appear in the title of the Monarchy, which was simply called "*Austria*," has thoroughly implanted it in men's minds, and, on the other hand, even to-day the independent sovereignty of Hungary and its legal entity as an independent factor in international relations is, externally at least, not thrown into proper relief.

In dealing with this fallacy,—which, were it correct, would render it impossible for us to welcome this International Association independently of Austria, or to take an independent part in its debates,—as indeed in all international conferences,—I may refer, in the first place, to the fact that there is no such thing as Austro-Hungarian citizenship, as there would naturally be, were the two States one political unit. Austro-Hungarian citizens, as one often hears citizens of either State described abroad, do not exist: there are either Austrian subjects or Hungarian subjects. In this respect Austria is just as much a foreign State in respect of Hungary, and *vice versa*, as any other foreign country. I may refer further, to the fact that Austria and Hungary have no common Legislature: each of the two States has its own independent Parliament; and each of the latter is possessed of an entirely distinct organisation. Laws in force in Hungary can only be passed by the Hungarian Legislature (consisting of the Upper and Lower Houses), with the sanction of the Monarch as the duly crowned king of Hungary: the Austrian “Reichsrat” has just as little power over the territory of Hungary as the Hungarian Parliament has over that of Austria. Even for the above-mentioned “common” affairs (*i. e.*, military affairs and foreign politics) there is no “common” Parliament,—the bills relating thereto are passed *separatim*, by the Hungarian Parliament for Hungary, and by the Austrian “Reichsrat” for Austria. The so-called “delegations” do not either constitute a common Parliament: for, apart from the fact that the said delegations are merely committees deputed by the two Legislatures which sit and pass resolutions separately, and do not vote in one body unless conflicting resolutions are carried in the two committees, their sphere of action is essentially confined to the determination of the estimates of the common War and Foreign Offices, and does not include the creation of laws or legal forms in respect



even of common affairs, in particular of the organisation of the army. The ratification of international treaties is also carried out, not by the delegations, but separately by the Hungarian and Austrian Parliaments. And the carrying into effect of the laws, as well as the passing of the same, whether in the Courts or by the administrative authorities, is a matter that concerns Hungary and Austria separately, each in her own particular sphere. There are no common Austro-Hungarian Courts of law, but separate Hungarian and separate Austrian ones: there are no common administrative authorities of any grade, but separate Hungarian administrative authorities subordinate to the supreme control of the Hungarian Ministry, which alone have the power to act in Hungary; while the Austrian administrative authorities and the Austrian Ministry have power to act in Austria alone. Even the common ministries established for the management of common affairs do not represent an imperial authority to which Hungary and Austria are immediately subordinate as one uniform whole: consequently any decrees relating to these common affairs and addressed to Hungarian citizens (subjects) out of the ordinary routine of service can be issued by the Hungarian Government only.

All these facts prove clearly enough that, despite the community of affairs with Austria, whatever legal construction may be put on the same, we Hungarians are perfectly justified in claiming that foreign countries should recognise Hungary as an independent State, and should not presume the existence of a provincial subordination, particularly in the field of law. It is indeed natural and perfectly comprehensible that between two States, which possess a certain community of interests, a kind of uniformity and reciprocity in point of legal institutions should develop. For example, when passing laws concerned with "common" affairs,—*e.g.*, in determining the establishment of the common army and the conditions for the maintenance of the same,—Hungary

is obliged to act in conformity with Austria. In fact there are certain affairs in respect of which we have an agreement with Austria, by virtue of which it is considered desirable and opportune that the said affairs, though not "common," should be regulated according to uniform principles, by mutual agreement, in the interests of our mutual trade, particularly in view of the customs union existing between the two States. But, since the Compromise made in 1867, particularly as a result of the commercial and trade treaty recently made with Austria, the number of such affairs has been considerably reduced,—*e.g.*, the protection of patents, samples, and trade marks, hawkers' licences, postal and telegraph affairs, and maritime law, questions which were originally regulated on uniform principles, have been excluded. Moreover the independence of the Hungarian Parliament is not in the least impaired by the existence of such a state of things, for the mutual agreement with Austria does not include any Common law, and merely implies that, before presenting the bills to their respective Parliaments, the Hungarian and Austrian Governments, as equal factors, come to an agreement, without either of them being in any way subordinate to the other. But apart from this community with Austria in political and commercial matters, there is no branch of legal life in which the Hungarian Parliament is under an obligation to show any regard for Austria: and the actual legal development and legislation of Hungary is so entirely different to that of Austria, and so completely independent, that only in exceptional cases can a similarity or identity even of substance be established.

This is particularly the case in the field of public law and of administration, which in Hungary, a country that has for centuries possessed a constitutional form of self-government, are creations of a quite specific character. When they were placed on a more modern basis, as was

particularly the case with the adoption, in 1848, of a system of popular representation and a responsible Ministry, the standard applied was not that of the neighbouring Austrian or German peoples, which owing to their absolutistic form of government could not be taken as models, but the institutions and conceptions of the more distant English and French nations, which Hungarian statesmen and publicists had always made an object of study in preference to all others and recommended as worthy of imitation. But even in the field of Civil and Criminal law, the legal development of Hungary is so entirely independent of that of Austria, that the influence of the latter was quite an immaterial one even at a time when, politically and socially, the power of the Austrian *régime* was at its height. Until 1848, Hungarian Civil and Criminal law and the Hungarian judiciary existed in the form sanctioned for centuries by Parliament: the basis of the same was the "Corpus Juris" (Statute Book) sanctioned by the king, and in particular the so-called "Tripartitum" comprising Common law compiled by Stephen Werböczy as far back as 1514, as well as in the country and town statutes, which were strictly adapted to the interests of the various "estates," particularly of the privileged nobility<sup>1</sup> which stood for the nation. Consequently, even Roman and Canon law, which had so completely permeated the legal conceptions of Western nations, were unable to exercise any sensible influence: and it was not until the privileges of the nobility were abolished in 1848,—when in particular the peasants were liberated from their vassalage, and the entails of the properties of the nobility were broken, the transference and negotiation of the same being freely permitted,—that there could be any question of the legal development of Hungary at last taking a course in conformity with the modern

<sup>1</sup> This term is perhaps misleading. The Hungarian "nobiles" were rather a class of "freemen."

conceptions of Western nations, and adapted to the altered conditions of society, economy, and trade.

Unfortunately, the regrettable events of 1848—1849 prevented the Hungarian nation from developing the legal order created by the new laws to proper advantage; in fact, after the overthrow of the struggle for independence, Hungary was actually degraded to the position of a province of the Austrian Empire, and the Austrian Government obtruded the Austrian laws on the Hungarian nation. Luckily this state of things did not last long: as early as 1861, the former Hungarian laws were re-established in Hungary proper, with the modifications demanded by the change of conditions; and when, in 1867, the constitution was restored, and the King became reconciled to the nation, the way was opened for the realisation of the reforms that had been put off, and for the regeneration of the legal life of Hungary on a modern basis, in conformity with the requirements of the present age.

This was the commencement, in Hungary, of the present era, which it is to be hoped will be permanent, in which this country, with its political, economic, and legal independence, has entered the ranks of the foremost States of Europe. Though the work is still incomplete and much has still to be done before the edifice is perfect, very much has been done already during the last 40 years. And, although, particularly at the outset, we were rather at a loss as to how to organise the various institutions, not knowing what was the best abroad and what was best adapted to Hungarian conditions,—a fact that has led us into unavoidable errors,—on the whole we can boast of great progress, and can safely submit our more recent legislation and our administration of justice to the judgment of legal authorities abroad. It is true; we must also admit that the less we were enabled, owing to the entire change of conditions, to draw upon our own national legal convictions,

and the more we were driven to study and copy foreign models, the less were we able to avoid a certain dependency on those models: and, as our jurists, in contrast to our politicians, have been reared and fostered by German jurisprudence,—which is not only more accessible to Hungarian scholars as a result of the extensive knowledge of the German language here and owing to the direct intercourse of the two countries in the field of culture and trade, but as a consequence of its intrinsic value and the great results of its codification occupies a position of the first importance,—we have naturally come under a one-sided German influence, and have taken the jurisprudence and legal institutions of other nations into less account. But this dependency and one-sidedness is gradually disappearing. The practical experiences gained under the new conditions have prepared the way for a more critical and deliberate method of action: the younger generation of jurists, not content with what they find in the institutions of our immediate neighbours, have gone further afield, and, after carefully comparing the institutions of the various nations, do not adopt foreign models, of whatever origin, until they have cautiously weighed their merits. Consequently we may safely hope that before long we shall be on a level with the cultured West in legal matters too, and that both the substance and character of our legal institutions and our jurisprudence will secure us an independent position among the civilised peoples of the world.

After the restitution of our constitution, the first thing to be done was to place on a new basis the *organisations of the administration of justice*. In Hungary, previously, the administration of justice, as well as local government, had for the most part been in the hands of the local (county, town, parish) authorities: and apart from the special Court for the trial of bills of exchange cases established in 1840, only the higher tribunals were organised by the State.

Moreover the administration of justice and local government were not kept distinct: consequently both civil and criminal cases were subject to an indirect and secret procedure in writing, which was intricate and dilatory, and often endangered material justice. All this was soon changed. Act LIV of 1868 introduced a new and opportune procedure in civil cases: while Act IV of 1869 made the administration of justice distinct from local government, determined the qualifications of judges, and secured the independence of their position. In 1871 the Courts of first instance were organised by the State; and, for the management of criminal cases, the French system of public procurators was adopted. These fundamental reforms were added to later on; and wherever they proved inadequate, they were modified again. For instance, in the judicial organisation, the number of divisional Courts, which had originally been too large, was essentially reduced; a simpler and cheaper procedure was introduced for the trial of commercial and less important cases; in civil cases the system of appeal was organised in a more expedient manner; later on the Courts of second instance (the so-called "King's Bench") were decentralised: and a radical reform both of civil and criminal procedure was undertaken. In the case of the latter, the reform, which was based, as in the Western States of Europe, on the principles of publicity, oral proceedings, and directness, by the general application of the system of trial by jury, previously confined to libel actions, in 1896 and 1897 had, apart from some more recent modifications, been brought to a conclusion: while the reform of civil procedure, which has only partly been carried into effect by the legislation of 1893 and by several laws of more recent date dealing with points of detail, has for some time been ready in its draft form, and will, it may be hoped, before long be carried into effect. These reforms find their complement in the re-organi-

sation of the legal profession in 1874,—a re-organisation, however, which, owing to the unfavourable situation of the legal profession, still needs to be essentially improved upon,—and in the adoption of the institution of notaries public in 1875. And, finally, as the crowning piece of the work of establishing the judiciary organisation on a modern basis, I may mention the creation, in 1883, of the administrative Court, which at first dealt with tax and charges causes only, while in 1896 its sphere of authority was extended to cover all grievances relating to affairs of administration. More recently still, last year, a Court was organised for the settlement of conflicts between the judicial and the administrative authorities.

In connection with the regeneration of the judiciary organisations and judicial procedure, the codification of the *material law* required by the new conditions was begun before long.

The first demand of the public was for the creation of a modern Commercial law; for although, as far back as 1840, the Hungarian Parliament had passed several laws relating to commercial affairs (including the law of bills of exchange and of bankruptcy) which in the conditions prevalent at the time implied considerable progress, they were not on a level with more recent legislation passed in other parts of Europe, and with the rise of trade. Moreover, these laws were not valid throughout the whole territory belonging to the Hungarian Crown, a fact that led to many conflicts and differences. After careful preparation, the new commercial code was codified in 1875, and the new law of bills of exchange in 1876. Both were drafted with proper regard for the existing European legislation and jurisprudence. For the most part, however, they were modelled on the general German Commercial Code of 1861, or rather on the Austrian code which is identical with the same, and on the German-Austrian Bills of Exchange Act of 1847

respectively. We were obliged to follow the same, not only because they were admitted to be the best and most perfect legislative creations, but because we were in the closest connection with the commercial world of Germany and Austria. These two Acts were complemented in 1881 by a new Bankruptcy Act, which essentially strengthened the position of the creditors of reckless or dishonest debtors. On the other hand, it seemed necessary to offer due protection against the abuses of creditors, a result attained by the restriction of excessive interest on loans and of usury of all kinds, by the punishment of the same, and by the limitation of other forms of business (*c. g.*, the regulation of the sale of lottery tickets and stocks on the system of payment by instalments). In this respect, however, still further measures appear to be required, some of which are about to be realised, while others are still in course of preparation and will amount to a radical revision of the Commercial law. On the table of the House lies a draft for increasing the rigour of the Act of 1883 relating to usury and for preventing the fraudulent transfer of business, as well as a draft for a law relating to cheques passed at the Conference of the delegates of the Central European Economic Societies held last year in Budapest, and drawn up on the basis of the principles already sanctioned in Austria and Germany. There is also in preparation the draft of a law relating to co-operative societies, which in Hungary have given rise to many abuses, a fact in consequence of which the Legislature, as far back as 1898, provided that the co-operative societies established for peasant farmers and industrials and supported by a central institute should be protected against every kind of spoliation. Similarly, there are drafts for laws dealing with purchases by the "hire purchase system," insurance societies, mining, exchanges and exchange business, and for Maritime law: the latter, not being regulated by Hungarian Commercial law,



requires special legislation as soon as possible, all the more so as both on the Hungarian and Austrian coasts an edict dating from the 18th century (*Editto politico di navigazione*) is in force in combination with the original French "Code de Commerce" dating from 1807, which was introduced as a consequence of the conquests of Napoleon I. The validity of the same lasts until a new law is passed, a contingency that, in consequence of the suspension of community with Austria already referred to, may be expected in Hungary within a short time. It is natural that when the Maritime law is codified, due regard will be had for the results of the more recent international congresses and in particular of the diplomatic conferences.

In connection with Commercial law, I must mention those laws also which have been passed in respect to the carrying on and encouragement of industry and to industrial property and copyright, by which we have endeavoured to follow in the steps of Western nations. To the first group belong the Industrial Acts of 1872 and 1884, which are, however, at present under revision, and have already been essentially supplemented by the laws dealing with "Sunday rest," sick funds, inspectors of industry, and by those passed quite recently concerning the compulsory insurance of industrial and commercial employes against sickness and accidents. To the latter group belong the Act of 1884 dealing with copyright, the Act of 1890 concerning the protection of trade marks, which was essentially modified in 1895 by the recognition of the validity of words as trade marks, and the Patent Act created in 1895. The latter has, however, also been subjected to revision, as we are about to enter the International Union, a step we have decided upon in concert with Austria. To the same group belongs the general regulation of unfair competition, in respect of which several drafts have already been prepared and discussed.

In the codification of material law, perhaps even more

important than Commercial law was *Criminal law*, which in Hungary proper, since the invalidation, in 1861, of the Austrian Penal Code introduced in 1852, had been almost entirely without a legal basis: it had, in fact, practically depended upon judicial practice and upon the discretion of judges, a course of proceeding which is not at all in conformity with the fundamental principles of Criminal law. As far back as 1843 a splendid draft for a penal code was prepared, which showed great progress in view of the criminal jurisprudence of those days, and in fact contained radical changes in many respects,—*e. g.*, in particular it abolished death sentences. For that very reason, however, a conflict arose between the liberal Lower and the ultra-conservative Upper House, which prevented the passing into law of the draft. Consequently the work of creating a penal code had to be commenced afresh after the restoration of the constitution. The draft just mentioned proved to be somewhat out of date: therefore it could not simply be passed into law as it stood. Many experiments to use the said draft as a basis proved futile: and it was not until 1878, after a long course of preparation and a thorough discussion of the matter, that the new Hungarian Penal Code was completed. It is true that the said code cannot claim any particular originality, it being in fact just as nearly related to the German Criminal Code of 1870 as the Hungarian Commercial law is to the German Commercial Code; and even its system of punishments is not so radical—even in respect of the classification of crimes—as the draft of 1843: but it occupies an important position among the codes of Europe, a fact that has been admitted by foreign authorities too. As this code was concerned with crimes and offences only, another penal code was drawn up in 1879, dealing with misdemeanours (minor offences). Both these codes were put into force in 1880 by special Act of Parliament. But the recent remarkable progress of Criminal law, the ideas

of reform that have subsequently arisen, and the practical experience here, have rendered a revision of this code too necessary. This revision is not indeed quite complete: but during the present year it resulted in the passing of a novel of the highest importance, which introduced the institution of conditional condemnation that is becoming daily more general in foreign countries, initiated a special system of correction and training for juvenile offenders, and contains several other significant modifications and additions.

The codification of Civil law, which is unfortunately still incomplete, has been left till the last. The situation in which the re-establishment of the constitution found the country in this respect, and which is still unchanged, is as follows: in Transylvania and the South of Hungary, the Austrian Civil Code of 1811, introduced in 1853, is still in force; while in the greater part of Hungary proper the code was not maintained at the time of the restitution of Hungarian law in 1861, except in so far as it was connected with the institution of land registers. As, however, owing to the extensive reforms carried out in 1848 and in the fifties, the old Hungarian law was out of place in the new conditions, the latter was duly modified by a Conference summoned by the Lord Chief Justice which met in 1861, in the form of temporary rules: while the law of contracts and real property referring to estates not entered in the land registers was developed for the most part on the basis of the Austrian Civil Code, though often by irregular judicial practice too.

The new constitutional government, fully conscious of the absurdity of the situation, at once undertook the codification of Civil law, together with the other reforms. At first, however, the only result was drafts dealing with particular parts of Civil law, which were either not passed into law, or merely referred to individual institutions the regeneration of which had already become urgent. So in 1876 the legal requisites

of wills were regulated; in 1877 the institution of guardianship was settled, and, in connection therewith, the scope of individual capacity of action was determined. Laws were passed dealing with expropriation, interest, the service of servants and agricultural labourers, the adjustment of the conditions of possession, etc. But the most significant creation was Act XXXI of 1894, dealing with the laws of matrimony, which introduced, in a binding form, civil marriage, an institution previously unknown in Hungary, which, however, owing to the differences in religion, was indispensable: as a consequence of the same, the system of State registry offices was organised. In the meantime, the work of preparing the civil code had progressed. The progress was more rapid after the completion of the German Civil Code, which could be used as a model; although we are convinced that this great national work was not so successful as might have been expected after the strenuous efforts made to prepare it, and does not render superfluous a careful study of the civil codes of other nations,—*e.g.*, the older French, Austrian and Italian, as well as the new Swiss,—and of the literature dealing with the same. At present the position with regard to the new civil code is as follows: in 1900, a commission prepared the first draft of the same together with the motives, published in 5 volumes in 1901—1902. The same has been discussed afresh by the commission: and these discussions, as well as the criticisms and proposals offered by the general public, have also been published. On the basis of the same, a commission of wider scope, appointed for purposes of codification, is engaged in systematically discussing the main questions of principle. After the latter have been finally decided, a result that may be expected before the present year is out, a second draft will be prepared, which will be laid before Parliament as definitive. Consequently we have every reason to believe that, before long, this crowning piece of codification, which

has already become an urgent necessity, will be completed : and then we shall be able conscientiously to say that the new legal edifice of Hungary is entirely ready. And the citizens of Hungary, as well as those foreigners who hold intercourse with us will, under its protection, enjoy complete security with respect to all those conditions of life which require legal adjustment.

Before concluding this short sketch of the legal conditions of Hungary, I must refer to one more important peculiarity, due to the singular political status of Croatia and Slavonia, which form an annexe to the lands of the Hungarian Crown. While the other parts of the country,—even those which, like Transylvania in particular, were formerly separated from the mother country,—at present form one uniform whole, both in point of legislation and administration, Croatia and Slavonia possess an extensive autonomy in both respects. This autonomy includes, besides home affairs and education, the department of justice too. The Courts (both of first instance and the higher ones) acting in the territory of Croatia and Slavonia are organised independently, and are subordinate, not to the Hungarian Minister of Justice, but exclusively to the governor, called the Ban of Croatia, Slavonia and Dalmatia, who resides in Záhgráb. The legislation concerned with Civil and Criminal law and with procedure belongs to the sphere of authority of the separate Croato-Slavonian Diet. Consequently the Civil and Criminal laws that have been or may be passed by the Hungarian Parliament do not refer to the territory of Croatia and Slavonia : and, in so far as the Croato-Slavonian Diet has not passed any new laws dealing with such questions, the Austrian laws introduced in the fifties of last century are still in force. The affairs which belong to the sphere of authority of the Hungarian Parliament acting with the assistance of the Croato-Slavonian delegates are the following : those which are not strictly legal, viz : financial,

military and all affairs relating to commercial politics and to traffic; international treaties; besides these: citizenship and naturalisation, which is the same for the whole territory belonging to the Hungarian Crown; Commercial law and laws of bills of exchange, including banks and insurance companies; mining laws; patent and trade mark laws; copyright laws; industrial legislation; and several other affairs. These are all regulated and adjusted for the whole territory of Hungary in common. But, apart from the extension of the sphere of authority of the administrative Court and the patent offices to cover Croatia and Slavonia too, Maritime law is the only instance in which not only the legislation but also the jurisdiction is exercised uniformly all over the country. In this respect the jurisdiction belongs to the Royal Court of Justice of Fiume and to the Hungarian superior Courts respectively.

This, Gentlemen, is the short sketch I considered it necessary to give you of our legal conditions, in order to enable you, on the occasion of your visit among us, to gain a due impression of the same, and to convince yourselves of the honest endeavours we are making to secure a worthy place in the ranks of civilised nations in the field of law as elsewhere, and to prove the justice of our claim to take part in all international conferences of as significant importance as the present one, as independent factors.

F. NAGY.

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## II.—THE DEFECTS OF THE DEBTORS ACT.

THAT imprisonment for debt ought to be wholly abolished is the opinion of many eminent legal authorities, and in this opinion the writer of the present article fully concurs. But it is certain, notwithstanding the title of Part I of The Debtors Act of 1869 (and the corresponding Irish Act of 1872), that the framers of

the Act in question did not contemplate or aim at total abolition. They proposed to abolish imprisonment for debt, "with the exceptions hereinafter mentioned," which are six in number, and are set out in detail in the statute. Still less is it true, as has often been alleged, that the statute in abolishing imprisonment for debt substituted for it imprisonment for contempt of Court. In some of the exceptions, *e. g.*, imprisonment for non-payment of rates, no order of any Court has been disobeyed; and even when there is such an order, the imprisonment is not for contempt but for debt, *i. e.*, for non-payment of a sum of money. This was judicially decided by Mr. Justice Cave, in *In re Ryley ex p. the Official Receiver*.<sup>1</sup> If some of the *dicta* in *Stonor v. Fowle* point in the opposite direction they were extra-judicial and not necessary to decide the case. The County Court in that case had found that the debtor had the means of paying the entire sum mentioned in the committal order, and the question what would have been the effect of a finding that he was able to pay part but not the whole did not arise.

But that the number of imprisonments for debt which have taken place of late years is far in excess of what the framers of the statute either intended or desired must, I think, be admitted by all. It has, in fact, become an evil which calls for a remedy, more especially since, under the Prison Rules of 1899, the condition of the imprisoned debtor while in prison is much worse than it was before the Debtors Act. The fault, we are often told, lies not in the law but in the administrators of it; but the administrators usually referred to are the County Court judges, whose legal capacity would be quite sufficient to keep them straight where the path had been clearly chalked out for them. Great diversities in the administration of a statute usually mean great indefiniteness or

<sup>1</sup> 15 Q. B. D., p. 329.

ambiguity in the framing of the statute itself, and to this rule the Debtors Act forms no exception.

One common-sense principle on which parts of the Act proceed is, that no man should be imprisoned for non-payment of what he cannot pay. But this principle is not consistently applied, and a man's inability to pay the rates as already noticed affords no protection against a committal for non-payment. Such committals in fact take place every day. And the Act seems to have contained no provision which rendered inability to pay a defence against an application to the justices of the peace to commit a man for failing to comply with a maintenance order. A remedy for this latter evil was indeed provided ten years later by the Summary Jurisdiction Act of 1879 (sect. 35, sub-sect. 2), but the magistrates apparently did not always insist on proof of means, and at the end of another twenty years a test case was tried in the High Court which established the necessity of this requirement.<sup>1</sup> It is believed, however, that the justices of the peace still often make committal orders in such cases without proof of means. It is remarkable that, so far, the Committee on Imprisonment for Debt does not appear to have dealt with this class of committals which are pretty numerous.

Turning to the County Courts and the judgment summons process, the principle is acknowledged, but with the addition that if the debtor has had the means to pay the debt since the judgment was entered up, or has had means to pay the overdue instalments since the instalment order was made, he is liable to imprisonment though he may no longer have the means to pay at the time that the committal order is applied for. The object of this provision seems to have been to prevent the debtor from getting rid of his property by sham or fraudulent assignments and then declaring that he has no means of paying

<sup>1</sup> *In re Gamble* (L. R. [1899], 1 Q. B., p. 305).



the debt. But as a judgment may be entered up against a man without his knowledge (personal service of the plaint not being required), the date at which notice of the judgment was personally served on the debtor ought to be substituted for the date of entering up the judgment, while it is still more evident that the date when the instalment became due ought to be substituted for the date of the instalment order. The Act seems to have been framed on the assumption that the debtor had not paid any instalment, and may obviously work injustice if he breaks down after paying two or three instalments.

This last evil might perhaps have been avoided by a provision that no instalment order should be made (on a creditor's application) without proof of ability to pay the instalments, *i.e.*, proof that he would be able to pay them if his present earnings (or income) remained unaltered. The intention of instalment orders was clearly to provide for the case of debtors who could not pay the debt at once (for if they could do so, why not make them pay it?), but would be able to pay it by instalments if given time for the purpose. To justify the making of such an order there ought to be some evidence of present inability and future ability; but the statute omitted to state this in terms, and in the case *Stonor v. Fowle*, already alluded to, it was held that an instalment order might be made without any evidence that the debtor was likely to have the means of paying the future instalments. Matters are made worse in practice by leaving the making of instalment orders to the registrar instead of the judge.

In fixing a limit of six weeks for imprisonments under the judgment summons process, the framers of the statute probably intended that no debtor should be detained in prison for more than six weeks in respect of the same debt. But by enabling the judge (or even the registrar) to make instalment orders and rendering the debtor liable

to imprisonment for non-payment of each instalment, they have almost entirely deprived him of the benefit of this limitation. The Act contains no limit as to the number of instalments or as to the smallness of each instalment. Orders have been made for instalments of one shilling, and in a recent case mentioned in the newspapers a debtor was actually sent to prison for non-payment of two shillings—which, in that instance, it seemed clear that he was quite unable to pay. And, of course, the smaller the instalment is, the easier it is to prove past or present means of paying it. It is clear that a limit ought to be introduced, if not as to smallness of the instalments or the number of them, at least as to the amount of overdue instalments for which a committal order could be made. Supposing that the original debt were two shillings, few judges, I think, would grant a committal order for non-payment of it. Why should it be otherwise with an instalment which may involve an imprisonment of equal duration?

The procedure, though it may involve imprisonment (under penal conditions since the rules of 1899), is a civil one, and the debtor has not the benefit of the rules of criminal evidence which he would have if he had stolen the money which he has borrowed. There is no provision for giving him the benefit of any reasonable doubt that exists as to his means, nor is he allowed the option of giving his evidence or refusing to give it without prejudice to his cause. But evidence seems to be often admitted at the hearing of a judgment summons which would have been excluded at an ordinary civil trial. This seems to have arisen from the fact that the statute only requires the debtor's means to pay the debt to be proved "to the satisfaction of the Court," without any indication of what kind of evidence the Court ought to regard as satisfactory. A debtor's means to pay a debt is a subject on which it is usually difficult to obtain satisfactory information, and the great difference in practice

which exists arises chiefly from whether the judge construes the indefinite phrase in the statute favorably to the creditor or to the debtor. Those who adopt the former course are of opinion that the main object for which the County Courts exist is the collection of small debts, and that they would fail to effect this object if conclusive legal evidence of means to pay were insisted on; while they believe that the ill-consequences of a wrongful finding as to means to pay may be averted by giving the debtor time and putting a stay on the committal order until this time has expired. This is an illogical proceeding. If the debtor can pay now, why not make him pay now? And if he cannot pay now, are his future means of payment so certain as to justify a prospective committal order in case of default? It was held in *Stonor v. Fowle* that the statute did not justify an instalment order supported by a prospective committal order, but unfortunately the decision allowed the judge to do indirectly what he could not do directly.

Although the Rules are not a part of the Act, they may be here referred to as sources of erroneous decisions. The statute, after providing that "proof of the means of the person making default may be given in such manner as the Court thinks just," adds "and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath according to prescribed rules." This gives the creditor leave to summon the debtor as a witness to prove means to pay if he so desires, but the intention seems to have been only to require the debtor's attendance when the creditor sought to examine him. The Form of Judgment Summons, however, requires his attendance in all cases, in order to be examined as to his means to pay; and instances have occurred in which he attended pursuant to this summons, waited till the plaintiff's witnesses had been examined, expecting to be examined as stated in the summons, and then

heard a committal order pronounced without being asked a single question. He was not aware of the necessity of volunteering his evidence if he wished to give it on his own behalf. But there is more than this in the Form of the Judgment Summons. Instead of informing the debtor that an application will be made to commit him for non-payment of the debt, he is called upon to show cause why he should not be committed! The Act clearly throws the *onus* of proving means to pay on the creditor, but here the debtor (or his wife, who usually represents him) is practically told that he will be sent to prison unless he shows cause to the contrary, and is thus set on a totally erroneous track as regards his defence.

One grand defect of the Act is, that it assumes throughout that the debtor has but one creditor, and that if he had the means of paying that creditor and did not pay him he ought to be committed to prison. Yet the judge may, when the application to commit is made to him, be aware that there are other unsatisfied judgments and other instalment orders running against the debtor in his own Court, and that payment in full of one creditor will very probably prove detrimental to others. It is plain that if the examination of the debtor on a judgment summons is to become a reality, it should embrace his liabilities as well as his assets, and that the judge should take both into consideration in making his order. A partial remedy for this evil has been supplied by the Bankruptcy Amendment Act of 1890 (which does not extend to Ireland), but the small number of orders made under it sufficiently proves its inadequacy. Why should not a man whose assets are small have the same right of saving himself from imprisonment by giving them up for the benefit of his creditors as if his assets were larger? and why impose prohibitive fees on this proceeding? His assets may be quite as large compared with his liabilities as those of the greater part of the

bankrupts who escape imprisonment by the aid of the bankruptcy laws. If he has been guilty of no fraud and offers to give up all that he has, together with a reasonable proportion of his future earnings, what more should be required of him ?

One great defect of the statute, however, has since been accentuated by the growth of a class of creditors at whose instance the greater part of the present imprisonments for debt are made—those who give credit on exorbitant terms, relying simply on recovering the debt by the threat of imprisonment, when if the debtor has not the money he may have some friend or relative willing to pay the ransom. On the hearing of a judgment summons, the County Court judge is not only debarred from looking into the circumstances under which the judgment was obtained, but he is compelled to enforce payment of the entire amount, whether in one sum or by instalments, when the requisite proofs are given. I do not suggest that the question of the validity of the judgment should (save in a few instances) be reopened on the application for a committal order, but I think the judge should be authorised to consider whether it was reasonable or just that the creditor should exact the entire debt, with imprisonment as the only alternative, or whether it would be more fair and reasonable to limit the instalment orders and committal orders to a portion of the debt only, leaving the creditor to his other remedies as regards the residue. For example, to take a case which has sometimes occurred : the debtor effects a private composition of, say, five shillings in the pound with his other creditors, but one who has obtained an instalment order insists on payment in full, or imprisonment if not paid. In such a case the judge should have power to say that in his opinion the creditor should have fallen in with the other creditors, and that the instalment order should cease to be operative as soon as five shillings in the pound had been paid.

In dealing with imprisonments under the Act, it should be borne in mind that the majority of the debtors do not know the law, and that they cannot afford to pay for legal assistance. (If they procured such assistance it would be regarded as proof of means to pay.) On the other hand, the plaintiffs (I regard the debt-collectors as the real plaintiffs in the cases which they conduct) have often made a study, not merely of the law, but of the idiosyncracies of the particular judges with whom they have to deal, and understand the exact amount of *suppressio veri* and *suggestio falsi* which can be introduced into an affidavit without rendering the deponent liable to a prosecution for perjury. It has been said that the judge at an English criminal trial acts as counsel for the prisoner when he is undefended, and though this is not universally true, the judge's questions often bring out the prisoner's defence. It ought to be the same on a trial for non-payment of a debt which the debtor had the means of paying—which many advocates of the present system describe as a trial for dishonesty. The judge should endeavour to elicit the relevant facts, bearing in mind that the plaintiff knows what to keep back, while the defendant may not know what to bring out. Some further protection is clearly needed against this class of plaintiffs. The credit which they give is an undesirable credit, and it is in the public interest to discourage it rather than to encourage it. The credit which is given solely in reliance on the imprisoning clauses of the Debtors Act, is always an unhealthy credit. The real object of the statute, I believe, was to enable creditors, who had given credit on ordinary terms to ordinary customers, to enforce their debts by imprisonment when the debtors, though able to pay, unexpectedly refused to do so. It was not intended to create a new class of debts in which the creditors from the outset relied on imprisonment to collect them, and made a consequent study of all the arts and tricks by which such imprisonment might be brought about.

Had there been many creditors of this class in the year 1869, I can hardly doubt that the statute would have required the creditor to pay for the maintenance of the debtor while imprisoned at his suit, adding the sum thus paid to the amount necessary to procure a release. This would place executions against a man's body in the same position as executions against his goods, viz., the loss to fall on the creditor when the proceedings prove abortive. It can hardly be contended that imprisonment at the suit of money-lenders, credit-drapers, speculative purchasers of bad debts, etc., is beneficial to the public. Why, then, should the public pay for it? The creditor can, under the present system, release the debtor at any moment by a stroke of his pen. Statistics seem to show that almost all debtors who do not pay within the first two or three days serve out their sentences. It seems clear that in many of these cases the creditor knows that he will not recover the debt long before the sentence expires, but he will not sign the order for liberation because further detention costs him nothing. The public ought to be empowered either to turn the debtor out or to make the creditor maintain him.

APPELLANT.

### III.—THE ASSESSMENT OF PUBLIC BODIES FOR INCOME TAX.

IT used to be the custom for public bodies to make their returns of interest under Schedule D of the Income Tax in some detail. Each loan was treated separately, and deductions were made for Schedule A when required. There was much to be said against this crude plan, and it appears to have been considered necessary to make a change and to put the assessment of interest paid by public bodies upon some intelligible and indeed scientific basis. There was a school who thought to achieve this object by assessing

the interest absolutely in full, relying principally, though not entirely, upon words introduced into the Statute 16 & 17 Vict., c. 34, by which all interest of money was liable to assessment. This consummation, however, could only be achieved by degrees.

The principle appears to have been first applied in the Aberdeen case.<sup>1</sup> This case was heard in June, 1890. The circumstances were briefly these: Aberdeen required a new town hall. The Commissioners of Supply built the town hall, borrowed the money on the security of the rates and paid the interest. They were assessed firstly under Schedule A on £145 for the annual value of the town hall, and, secondly, under Schedule D on £92: 10s. in respect of the interest of the money borrowed to build it.

Now it is perfectly evident that if a private individual had built a house in similar circumstances, that is to say, having no money of his own, the house being of the same value, and the money borrowed in such a way as to bring about a deduction of Income Tax, no such assessment would ever have been made. There would have been an assessment under Schedule A, of course, but that would have been all. It would have been recognised that, although the private individual referred to was the titular owner, the real and effective ownership was in the party who advanced the money. But in this case it was said that the interest was secured on the rates, and that there were two totally different persons interested in the charges, first the Commissioners of Supply, who paid the income tax on the town hall, and secondly the creditors on the rates who received the interest. Consequently there was no double assessment at all. In view of the subsequent development of this subject it may here be noted that a substantial amount (£40) was received by the Corporation for actual rent of part of the premises, which under any circumstances at the

<sup>1</sup> *Aberdeen Commissioners of Supply v. Russell*, 27 S. L. R. 759.



present day would be considered a fair ground for a set-off. But apart from this it requires considerable ingenuity to see any difference in principle between the case of the Aberdeen ratepayers and that of the private individual before referred to.

It may be asked, and with some show of reason, why the Commissioners of Supply did not at once enter an appeal. The reason is that there is no Court of Appeal in Scotland, and they must have risked an appeal to the House of Lords. But the tax was too insignificant to render such a step necessary or desirable, and the sequel will show that they were well advised.

Almost immediately upon the Aberdeen case follows that of Portobello.<sup>1</sup> Here the town clerk made the mistake of appealing against the wrong assessment. This assessment being upon the actual profits of the Portobello Cemetery, could not properly be impeached. There was, however, another assessment which might probably have been attacked. The existence of this other assessment is only alluded to in the surveyor's contention, the amount not being named. After stating the assessment on the profits, the surveyor goes on to say that this is "in addition to the assessment separately made upon the interest paid out of the rate. . . . Here the profit was applied to the relief of the actual cemetery rate, which must be levied at a considerably higher rate were it not for the profit earned in the working of the cemetery." The town clerk seems to have thought that until the capital sum was paid back the ratepayers made no assessable profit. It appears that in 1890 the debt to the Standard Office stood at £2,768. The amount of profit actually assessed would more than cover the interest, even assuming that the interest on £337:10s. (one year's repayment) had to be added to that on the £2,768 already referred to as being due to the

<sup>1</sup> *Portobello Town Council v. Sulley* (1890) 27 S. L. R. 863.

Standard Office. At any rate, it is perfectly clear that the decision of the judges dealt solely with the assessment of £185, and could not be quoted as any authority on the subject of the assessment of interest.

The next case of importance<sup>1</sup> was heard in 1896. To understand this case at all requires a little preliminary information. For some years the London County Council had been paying their interest to the Bank of England in full, making no deduction for Income Tax. The Bank of England deducted the tax from the recipients and paid the amount so deducted to the Board of Inland Revenue. The London County Council then obtained a repayment which satisfied them in respect of the rents of property which they let. The last repayment of this kind made by the Revenue was for 1889-90. However, for the year 1893-4, the Inland Revenue Department put in a claim in addition to the gross amount of tax on dividends on the London County Council loans, for the tax on the amount of interest received by the Council on loans made to the School Board and various other public bodies for 1892-3, such interest amounting to £352,021 : 6s. 10d. The Divisional Court gave judgment for the Department. The Court of Appeal upheld this decision and dismissed the appeal with costs, on the ground that the assessment appealed against was undoubtedly right, and that they had no concern with anything else. All parties knew, of course, that the assessment was technically correct, and the only hope of the Council was that the Appeal Court would take a large view of the matter by bearing in mind the assessment at the Bank of England. This hope, however, proved to be fallacious. It is evident from the report that neither Lopes, L.J., nor Rigby, L.J., was satisfied with the position of affairs, although they had no power to interfere with an assessment which in itself was perfectly

<sup>1</sup> *London County Council v. Grove*, 45 W. R. 279.

correct and legal. Thus the case was of no use to the Council, who were indeed mulcted in costs for having brought their action in wrong form. It was of no use to the Board of Inland Revenue, who were as far as ever from discovering what they would probably have been glad enough to know, viz., what they were to do with any claim of repayment put in by the Council on the plea of double assessment.

And here I may point out that, by the Taxes Management Act 1880, s. 60, following 5 & 6 Vict., c. 35, s. 171, all claims of double assessment are left entirely at the discretion of the Board, against whose decision there is no appeal in case of any difference of opinion. No doubt it was thought when these Acts were passed that no case could ever arise in which the Board would be a distinctly interested party; nor would it be right to assume that the Board could waive their right, and that then the case would go on. The Courts will not undertake any responsibility not absolutely imposed upon them, nor can they be blamed, as the decision would be over-ruled easily enough; and even if agreed to (by consent of all parties) it would be *ultra vires* and of no lasting validity, and would be a standing record against the judges who were responsible for it.

The result of these proceedings was, however, to cause the County Council to see the unfortunate position in which they were placed by their own voluntary act, in paying the interest in full to the Bank of England and allowing the latter to pay the Inland Revenue the total Income Tax thereon. It was now clear that in case of any difference of opinion between themselves and the Department (and on this matter there was a strongly defined difference) they were utterly without remedy. They therefore determined that for 1897-8 and subsequent years they would pay the tax themselves under the provisions of the Statute 51 & 52 Vict., c. 8, s. 24 (3); but the Inland Revenue Department forestalled

them by making an assessment upon them for interest, of which they received notice under date 20th November, 1897. The Council appealed against this charge. The Local Commissioners decided that the contention of the Council that they were only liable for Income Tax on so much of the dividends paid to stockholders as was not paid out of income already taxed, was correct. This occurred on 4th January, 1898, but in July of that year the Council were officially informed that the Board of Inland Revenue had abandoned the case, and were going to lay an information under 51 & 52 Vict., c. 8, s. 24 (3). More than twelve months elapsed after this without any steps being taken. On the 10th February, 1899, the Council wrote to the Treasury on the subject. The reply from the Treasury was dated 14th March, 1899, and on the 17th of that month the Council received a copy of the information. The case was heard in the Queen's Bench on the 1st of June, 1899. The Crown on that occasion, through the Attorney-General, gave up their contention that none of the dividends on the stock of the County Council are by law payable out of profits or gains brought into charge under Schedule D. But notwithstanding this, the Council were mulcted in the whole of their costs. The case was heard again by the Appeal Court in December, 1899, and judgment was given dismissing the appeal with costs. The Council now appealed to the House of Lords. The case was heard on the 23rd and 24th June and 26th July, 1900, and on the 10th December in that year the decision in the Courts below was reversed and judgment given in favour of the Council.<sup>1</sup>

There are some interesting and noteworthy points to be gathered from the Lords' judgments. Lord Macnaghten said:—"It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of Income Tax assessed under Schedule D, and those assessed under Schedule A or any of the other schedules."

<sup>1</sup> L. R. [1901], A. C. 26.

Again, the right to deduct and retain a tax from interest or other annual payments holds good even if the profits or gains out of which it is payable are not exclusively charged therewith. On this point Lord Davey says:—"It is not required by the Income Tax Acts, in order to raise the right of deduction and retention, that the interest or annual payment shall be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of taxable income, although there may be other subjects of charge."

While on the subject of this judgment, it may be useful to give some account of the Birmingham Settlement. This appears to have been stated in a letter to the Corporation of Birmingham dated 18th October, 1892, though the principle was known before. It never had, or pretended to have, any legal basis. The reason it was accepted by Birmingham was simply that they, in compliance with a system then becoming fashionable, had arranged to pay their interest in full through the Bank of England, which circumstance of course placed them in the position which the London County Council were already finding intolerable. It is rather interesting, however, to notice in passing that although the Board of Inland Revenue repudiated any right on the part of the corporations to claim the annual value of properties they occupied, and which therefore brought in no rent, they did not object to bring these very sums into the Birmingham Settlement as a basis for allowance. The Settlement was worked in this way. Suppose the interest, which was the subject of inquiry, amounted to £5,000 (which is then supposed to be the amount raised out of rates), and the rents of property to £4,500, and property occupied by the Corporation to £500, then as

$$£10,000 : £5,000 :: £5,000 : £2,500$$

the amount chargeable on the *interest paid out of the rates* as distinct from the property, which was supposed to pay the

remainder. The results are most bizarre. Suppose, for instance, that the real property of the corporation amounts to £50,000, and the interest to £5,000, the Birmingham Settlement works out as follows:—

$$\text{as } £55,000 : £5,000 :: £5,000 : £454.$$

Now supposing that instead of being ten times the amount of the interest the property amounts to one-tenth of the amount of the interest, then as

$$£5,500 : £5,000 :: £5,000 : £4,545.$$

Let us now collate these three cases:—

Property.		Interest secured on rates, etc.		Assessment on such Interest. (Birmingham Settlement.)
£50,000	...	£5,000	...	£ 454
5,000	...	5,000	...	2,500
500	...	5,000	...	4,545

Or we may consider the matter in this light:—

Assessed on Interest and Property. (Birmingham Settlement.)		If assessed on whichever is greater. Interest or Property.		Net charge to be paid by rates. (Birmingham Settlement.) Tax on.
£50,454	...	£50,000 (property)	...	£ 454
7,500	...	5,000 ( do. or interest)	...	2,500
5,045	...	5,000 (interest)	...	45

One difficulty which instantly occurs to the mind with regard to this system is this: If it ever was the intention of the Legislature to charge the interest in full, why make these deductions at all? The very making of the deductions appears to prove that there is a feeling somewhere and somehow that the charging of such interest was never intended. It is perfectly plain, too, that the tax mentioned in the last column of the above statement is a tax on the rates, as it represents no income and is payable by the rates

as general guarantors of every charge upon the income (including any Income Tax) which the public body is unable to get back.

It would scarcely have been necessary to mention the Birmingham Settlement in connection with this case, but that the Attorney-General, in paragraph 11 of the Information, introduced the proportional system (of which the Birmingham Settlement is the most usual form) in regard to the consolidated loan fund of the London County Council, and in his argument he says: "If the security that the holders of consolidated stock have is in its nature a charge on the whole fund, the proper way to deal with the right to deduction is to take the proportion thus:—as £2,450,000 : £500,000 :: £1,160,000 : the amount of interest on which tax is to be retained by the Council for their own use." On this point Lord Macnaghten says:—

"It was seriously argued that, inasmuch as the holders of the metropolitan stock have a charge on all the property of the Council—capital and income alike—for their interest as well as for their principal, and might, in case of default, resort to any and every item comprised in their security, therefore it would be right and proper, before default, to treat the dividend on metropolitan stock as paid rateably out of the capital of the property belonging to the Council and the different branches of their income. That is an ingenious, but not, I think, a very business-like suggestion. It is enough to say that it is the plain duty of the Council, not being beneficial owners of the funds which they administer, to keep down annual charges out of an annual income as far as it will extend, and not perhaps the less so because the instructions of the Treasury under whose financial control they are placed require them to keep accounts distinguishing capital from income. . . . I pass from that point. It is not, I think, open to argument."

Again, Lord Davey says:—

"On the second point I find it difficult to express myself with becoming respect. The contention is, that as interest on their consolidated stock is charged on the whole of the lands, rents and property belonging to the Council and on their rates, such interest ought, for the benefit of the Crown, to be apportioned rateably over all the subjects of the charge, and only a rateable proportion deemed to be paid out of their income from rents or from interest receivable by them or from their own debtors. The proposition has the merit of novelty. Admittedly there is no authority for it. The attention of your Lordships is not called to any statutory enactment directing any such procedure or to any principle of law which prescribes it. On the contrary, the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income."

Lord Lindley likewise says: "I also agree with what they (Lord Macnaghten and Lord Davey) have said on the subordinate question of apportionment."

From motives of policy only, the claim of the Council had heretofore been limited to the actual cash received on which duty had been paid. It was now determined to carry the point still further, and to claim off the annual value of certain lands occupied by the Council, and on which they had paid Income Tax, which were the source of no monetary income, but rather of expense. The case was decided in favour of the Council on the 28th June, 1904,<sup>1</sup> and also by the Court of Appeal, consisting of the Master of the Rolls, Lord Justice Mathew and Lord Justice Cozens-Hardy, on the 8th June, 1905.<sup>2</sup> But in the House of Lords, on the 19th March, 1907, a directly contrary judgment was given in favour of the Inland Revenue Department.<sup>3</sup> It is right to mention that Lord James of Hereford, while voting with the others, made these remarks: "My Lords, I entertain grave doubts as to the judgments which have been delivered in this case, but they are not strong enough to cause me to dissent from the views which have been expressed by my noble and learned friends (the Lord Chancellor and Lord Macnaghten); therefore I concur in the motion before the House."

This, then, was the result of the two cases: First, the Council was entitled to deduct from the amount of their stock their actual and assessed income under Schedules A and D; second, they were not entitled to deduct the annual value of the property they held in ownership and did not let.

It is of course quite useless to criticise a decision of the House of Lords. From the moment it is made it becomes the law, whatever we may think the law was before. At the

<sup>1</sup> L. R. [1904], 2 K. B. 635.

<sup>2</sup> L. R. [1905], 2 K. B. 375.

<sup>3</sup> L. R. [1907], A. C. 131.



same time, if it appears from a study of the subject that justice is not done by this decision, every effort should be made to induce Parliament to introduce such a section into the Acts as may rectify the anomaly, in like manner as there can be no doubt that the Statute 41 & 42 Vict., c. 15, s. 12, was the direct result of the case of *Forder v. Handyside & Co.*,<sup>1</sup> by which depreciation was disallowed. It is a well-known principle of the interpretation of statutes relating to revenue that if the words of any Act of Parliament explicitly charge the subject with any duty, it must be paid, no matter what hardship it may cause. But when we get out of the range of the Law Courts and consider the matter from the standpoint of a politician, many other considerations are allowed to have play. For instance, if it can be shown that the result of an adherence to a rule which has been approved of by the House of Lords is to burden the rates and charge an Income Tax where there is no income, the reverence we feel, and justly feel, for the House of Lords must give way to the higher considerations of justice and equity. Now, in the present instance, it is apparent that exemption and abatement cannot effectively be allowed where Income Tax representing no income is already charged on the rates. Exemptions are granted on incomes of £160 a-year and under; but of what use is that to a public body which finds itself charged, as already shown, on £2,500? In the London County Council case it was evident that, judged by the standard of any ordinary person, the London County Council had not a stiver of income of their own. That, however, has not prevented the House of Lords from assessing them on £118,000. Such a fact by itself is sufficient to show that, however circumscribed the House of Lords might be, and even coerced into the decision which we are considering, the matter cannot be allowed to remain where it is.

<sup>1</sup> [1876] 1 Ex. D. 233.

There are several subordinate matters which appear to require consideration.

It is well known that trouble has arisen in many municipal boroughs owing to the provisions of the Public Health Acts. These Acts have rendered it necessary to establish a General District Fund as well as a City or Borough Fund. Where this is the case the interest charged on the General District Fund is as a rule paid entirely out of the rates. This is no matter of surprise when it is considered that the buildings, etc., acquired under the Public Health Acts are generally sources of expense and not of profit, and occupied by the Corporation for the very purposes of the public health. It is of the utmost importance that the income and the interest in connection with both these funds should be treated together as if there were only one fund.

Another point necessary to be considered is the question of sinking funds. If it was necessary to establish that a corporation or a public body was not entitled to (say) abatement, it would be the duty of the Surveyor of Taxes to insist on the inclusion of the income on such investments in the statement of income, even if by doing so the public body was proved to be not entitled to the abatement claimed. Consequently, in every case, if for no other reason, the receipts from sinking fund investments ought to be counted into the income as against the interest. In some cases the Legislature has given power to corporations to invest in this way in their own securities. Where this is done it would seem that the tax should not be charged at all, for the reason that the income is non-existent except on paper. What has been said about sinking funds applies equally to reserve funds. Of course it may be that the interest payable out of the sinking fund or reserve fund to the Corporation may have the effect, on its being cancelled, of raising the profits; but that is immaterial. The great thing is to keep steadily in view the principle

that no charges not representing absolute income should lie upon the rates.

There are two interesting cases recently reported which give us some sidelights on the subject of this paper. I refer to the *Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted (Surveyor of Taxes)*,<sup>1</sup> and *Harris v. Edinburgh Corporation*.<sup>2</sup> In the first of these cases the capital involved was £156,000. The assessment was £800— $\frac{1}{8}$ th, or £666 : 14s. The money was spent on a sewer. In the *Edinburgh Case* the assessment was on £2,425, or net £1,839, in respect of certain public slaughter-houses. The cost of the building was £20,000. In each of these cases an unsuccessful attempt was made to show that the assessment should properly be made under Schedule A, Rule III. The point to which attention might more usefully have been given was entirely neglected. Of course Courts of law will not entertain cases of value at all, the object of "cases" being exclusively to settle points of law. In the Welsh case, so far as the Income Tax is concerned, the difficulty arises from their having borrowed money from the Public Works Loans Commissioners, who do not allow the Income Tax. But then it is worthy of remark that the amount paid upon the rates must be enormous by comparison with the duty on the Schedule A valuation.

Now by sect. 47 of the Act 16 & 17 Vict., c. 34, the appellant may require a valuation to be verified on oath by the person appointed by the Commissioners; and there appears little doubt that an appeal to the Assessment Committee against the valuation, and to the Income Tax Commissioners against the assessment, would be extremely useful. There seems to be no reason why a similar course should not be pursued in the *Edinburgh case*.

It is worthy of remark that in the Welsh case, as against the cost of £156,000 the gross assessment is only £800.

<sup>1</sup> L. R. [1907], A. C. 364.

<sup>2</sup> [1907] 44 S. L. R., 873.

In the Scotch Case, where the cost of building was £20,000, the gross assessment seems to have been £2,425. In both these cases stress was laid upon the fact that no profit could be or was expected to be derived from the undertaking; which appears to suggest that an alteration in the law is required doing away entirely with all assessments of property acquired under the Public Health Acts, not with a view of profit but solely for the public good. Indeed, the same considerations which have caused hospitals to be always exempted, speak loudly for the exemption also of all properties which are run solely on account of the public health, and which apart from this have no value.

Reverting to the general subject of this paper, it may naturally occur to the mind, what a clause passed in the year 1888<sup>1</sup> can have to do with corporations which were already flourishing in great numbers in the year 1842. The answer is, that there was a section dealing with the matter in the Act of the year 1842, but that events have rendered it antiquated and out of date. When the Act of 1842 was passed it was supposed to be for only a small number of years, and the sections were drawn accordingly. By sect. 102 the liability of the "proper officer" of the corporation is to account for the interest of the preceding year according to the rules of the third case under which it is put. Lord Macnaghten in his judgment in *Attorney-General v. London County Council*<sup>2</sup> gives an excellent description of the circumstances which caused the enactment of 1888 to be passed. On the whole it meets the case of corporations very well, although it was never intended for them. It only wants such alterations as above suggested to make it unexceptionable.

I cannot leave this subject without referring to the position in which corporations and other public bodies stand in this matter. They are really great syndicates

<sup>1</sup> 51 & 52 Vict., c. 8, s. 24 (3).

<sup>2</sup> L. R. [1901], A. C. 26.

which have become guarantors of all the undertakings they have in hand. They can make no profits, but must make good every loss. No doubt it would be easy enough for the servant of a corporation to pay whatever was demanded of him by the taxing officers and draw his salary contentedly till the time of retirement came. But many of the servants of corporations do not see their duty in this light: they look at matters through the ratepayers' spectacles, or rather it might be said through the spectacles which the ratepayers should use, but perhaps do not.

It is hoped that this paper will cause attention to be directed to these matters, so that a happier day may dawn for all parties concerned.

E. J. MOORE.

## IV.—THE LAW OF THE UNIVERSITIES.

### III. VISITATION.

#### (b) *The Colleges.*

**V**ISITATION of Colleges rests on Common law as far as it is not affected by statutes of the realm,<sup>1</sup> or of colleges.<sup>2</sup> At Common law "all eleemosynary corporations who are to receive the charity of the founder have visitors, if they are ecclesiastical corporations; and if a particular visitor is not provided by the founder, then the ordinary of the place is visitor: if they are lay corporations, the founder and his heirs are perpetual visitors."<sup>3</sup> The right of visitation is in law an incorporeal hereditament. The visitatorial power is a necessary incident of an eleemosynary corporation.<sup>4</sup> "It is," says Mr. Justice Story, "a power to

<sup>1</sup> *E. g.*, 20 & 21 Vict., c. 25, as to Queen's.

<sup>2</sup> As at Worcester, where the old composite visitor (the Bishops of Oxford and Worcester and the Vice-Chancellor) was replaced by the Lord Chancellor.

<sup>3</sup> *R. v. Blythe* [1699], 5 Mod. 404.

<sup>4</sup> *Appleford's Case* [1672], 1 Mod. 82, where a mandamus to restore a fellow of New College, who had been deprived by the visitor, was refused.

correct abuses and to enforce due observance of the statutes of the charity, but not a power to revoke the gifts, to change uses, or to divest rights."<sup>1</sup> The Courts do not take judicial notice that a college has a visitor, the fact must be proved. The chief duties of the visitor of a college at present are confirmation of the head, interpretation of the statutes, and to act as a court of appeal on application by a member, or one claiming to be a member, of the foundation.<sup>2</sup> His power of expulsion or deprivation, though still competent, has been little exercised in modern times. His power of appointment of a head on lapse frequently found in old statutes, seldom or never exists now. Though colleges are charities, they are exempt from the control of the Charity Commission. The fact that bishops are so often visitors is perhaps due partly to the convenience of creating a higher sanction by adding ecclesiastical to visitatorial authority, partly to the original position of some of the older colleges as quasi-ecclesiastical corporations. At present they are lay corporations, though every member be in holy orders.<sup>3</sup> The only college which is to any extent an ecclesiastical corporation is Christ Church,<sup>4</sup> where the dean and chapter share the government with the students.<sup>5</sup> Possibly the Crown is visitor of Christ Church as supreme ordinary of the realm, as well as by virtue of being founder. In case of disability

<sup>1</sup> *Allen v. Mc Kean* [1833], 2 Sumner (U. S.) 276.

<sup>2</sup> He may even confirm the election of the candidate with the minority of votes, as where the Earl of Pembroke confirmed the election of Dr. Wynne at Jesus, Oxford, in 1712. This proceeding was perhaps suggested by the *postulatio* of Canon Law, Decretals, i, 6.

<sup>3</sup> *Welch v. Hall* [1675], 3 Keble, 543.

<sup>4</sup> *Fisher v. Dean of Christ Church*, above. For prescription for discharge from tithe, a college may claim as a spiritual corporation where it is alienee of abbey lands, *Bowles v. Atkins* [1666], 2 Keble, 28.

<sup>5</sup> The anomalous position of Christ Church has led to the frequent assertion in Acts of Parliament (*e. g.*, 21 & 22 Vict., c. 44, s. 31), that Christ Church is for the purposes of the particular Act to be deemed a college. In some Acts (*e. g.*, 21 & 22 Vict., c. 94), it is provided that for the purposes of the Act the words "ecclesiastical corporation" are not to include Christ Church. This evidently shows that without such express exception it might be considered to be such a corporation.

by infancy, lunacy,<sup>1</sup> or otherwise of the visitor, or heir of the visitor appointed by the founder, or where the founder has appointed no visitor, or has only appointed a visitor to part of the foundation, or there is a failure of heirs of the founder,<sup>2</sup> or the Crown is founder, the right of visitation is in the Crown, and is exercised by delegation through the Lord Chancellor.<sup>3</sup> The Crown may confer the visitation as a franchise on a subject. It is a disputed point whether the Crown can confer inheritance of a visitation, but the better opinion is that it can. When the visitor has been elected head, and so visitor and visited combine in the same person,<sup>4</sup> the King's Bench visits during the temporary combination. The mode of bringing a case before the Lord Chancellor is by petition, not by information.<sup>5</sup> By sect. 17 of the Judicature Act 1873, it was enacted that there should not be transferred to the High Court of Justice any jurisdiction exercised by the Lord Chancellor in right of or on behalf of His Majesty as visitor of any college. It should be noticed that no technical words are necessary for the creation of a visitor. In the case of Clare the appointment of the Chancellor as visitor was gathered by the Court from the interpretation of the statutes.<sup>6</sup>

<sup>1</sup> *A.-G. v. Dixie* [1807], 13 Ves. 519.

<sup>2</sup> As in the case of St. Catharine's, Cambridge, after the failure of heirs of Wodelarke, the founder, *R. v. St. Catharine's College* [1791], 4 T. R. 233. The same thing happened at Trinity Hall, *Ex parte Wrangham*, below.

<sup>3</sup> Where the visitor is visitor of a part, the Crown only visits the residue. But new foundations generally fall under the old visitor. (*Jennings' Case* [1699], 5 Mod. 422.)

<sup>4</sup> This happened in the case of the College of Manchester, *R. v. Bishop of Chester* [1727], 2 Str. 727. It is only poetically and not legally true that a man may be himself the judge and counsel and himself the prisoner at the bar.

<sup>5</sup> *R. v. St. Catharine's College*.

<sup>6</sup> The result was that the Chancellor was held to be visitor. Even if no visitatorial authority be expressly given by the founder, the visitor has it as incident to his office. *R. v. Warden of All Souls* [1682], T. Jones, 175. *Ex parte Wrangham* [1795], 2 Ves. Jun. 609, was before the Lord Chancellor as visitor of Trinity Hall; and *Davison's Case* [1772], Cowp. 319, before him as visitor of University, as delegate of the Crown.

Decisions of visitors seldom occur in the ordinary law reports. Many of them turned on tenure of fellowships and on the meaning to be given to "founder's kin," of which the most important example is *Spencer v. All Souls College* (see below). Another All Souls case was *Watson v. All Souls College*.<sup>1</sup> The latest reported case seems to be one in 1866, where the Lord Chancellor, sitting as visitor, sanctioned the appropriation of part of the revenue of Christ Church in aid of the stipend of the Regius Professor of Greek.<sup>2</sup> In the histories of the various colleges there are continual allusions to appeals to the visitors, and there also exist pamphlets on certain cases which excited interest at the time.<sup>3</sup>

A glance at the names of the visitors as they appear in the university calendars gives some interesting results. The Crown is the most frequent visitor, not only of royal foundations but of others, such as University and St. Catharine's, by lapse of founders' heirs or otherwise.<sup>4</sup> The Bishop of Winchester is visitor of five colleges at Oxford, the Bishop of Ely of four at Cambridge, originally no doubt as ordinaries. The only college which has for visitor the descendant of the founder is Sidney, of which Lord de L'Isle and Dudley is visitor. Jesus, Oxford, has the Earls of Pembroke for hereditary visitors.<sup>5</sup> Balliol has the unique privilege of

<sup>1</sup> [1864], 11 L. T. Rep. 166. The report of the Commission, 329, mentions a decision of Archbishop Cornwallis in 1777. Founder's kin may still be of occasional importance, as at St. John's, Oxford, and Hertford. Jesus, Oxford, and several others still have close fellowships and scholarships.

<sup>2</sup> L. R., 1 Ch. 526.

<sup>3</sup> See, for instance, the Proceedings of Corpus Christi College in the case of Francis Ayscough vindicated (1730). He was a probationer fellow whom the college refused to elect actual fellow. The visitor reversed the decision of the college. The proceedings are described in T. Fowler, *History of Corpus Christi College*, 278. In the same college lately the President was elected by an ex-fellow who had not been re-elected at the proper date. The visitor held that the election was good, the re-election being retrospective.

<sup>4</sup> It is also visitor of Corpus, Cambridge, in extraordinary cases, but the interpretative authority under the new statutes is a board consisting of the Vice-Chancellor and two Regius Professors.

<sup>5</sup> The third Earl of Pembroke was not the founder, but was Chancellor at the time of the foundation.



electing its own visitor. Of Magdalene the possessor of Audley End for the time being is visitor and appoints the head.<sup>1</sup> Up to 1857 Queens' had one visitor for general purposes and another for the Michel foundation.<sup>2</sup> In some colleges, such as Clare,<sup>3</sup> Christ's, Emmanuel, and formerly Worcester, the office is composite or in commission, the number being usually three. In such a case a majority would probably be sufficient for decision, on the analogy of the majority of the members of a corporation under 33 Hen. VIII, c. 27.<sup>4</sup> The same Act was interpreted to give the head of a college in an election a negative but not a casting vote, unless the statutes provide otherwise.<sup>5</sup> The question who is visitor is in a disputed case to be tried by a jury, not in the Chancellor's Court, and not by the High Court merely on affidavit. In the case of University, the King's Bench, in 1726 on a disputed election to the Mastership, declared it to be a royal foundation and its visitor to be the Crown.<sup>6</sup> This decision was recited in the college statutes of 1736, probably a solitary instance of the incorporation of a decision in statutes. The question whether the Archbishop of Canterbury or of York was visitor of Queens' (Quenhalle) was settled by Parliament in 1412.<sup>7</sup>

<sup>1</sup> This right is preserved by the Act of 1877 until ceded by deed under seal by the possessor of Audley End.

<sup>2</sup> By 20 & 21 Vict., c. 25, the Archbishop of York became visitor for the whole foundation. In Bentley's time Trinity, Cambridge, had both a general and a special visitor.

<sup>3</sup> The visitor is remarkable, the Chancellor and two persons appointed by grace of the Senate.

<sup>4</sup> The canonical majority before the Act was two-thirds (*A.-G. v. Dary* [1741], 2 Atk. 212). In some cases, provision as to a majority is made by charter or statute.

<sup>5</sup> *R. v. Rlythe* [1699], 5 Mod. 404. As a consequence he is bound, although he be in the minority, to affix the corporate seal to a lease (*R. v. Windham* [1786], Cowp. 377), or the presentation to an advowson (*R. v. Kendall* [1841], 1 Q. B. 366). Whether his concurrence is necessary for the election of a fellow depends on the statutes. It was held that it was at Queens', that it was not at Clare and Caius. (*Re Queens' College* [1828], 5 Russ. 64.)

<sup>6</sup> Previously the university had been visitor.

<sup>7</sup> Griffiths, 8.

The importance of the visitor is still considerable, and has been little affected by recent legislation. In most cases of action taken by a college with regard to any of its members on the foundation or claiming to be on the foundation,<sup>1</sup> an appeal to the visitor is a condition precedent to proceedings at law or in equity. Even after appeal, since the visitor is in a judicial position,<sup>2</sup> the Courts will not interfere unless on proof of his declining jurisdiction, or on some ground which avoids his decision altogether, such as assuming jurisdiction, breach of trust, dealing with a trust estate,<sup>3</sup> or acting from interested or corrupt motives,<sup>4</sup> or in breach of elementary principles of justice, such as deciding on an *ex parte* statement. In such cases, mandamus or prohibition will be according to circumstances, and apparently an action if he act without jurisdiction. In one of the *Bentley* cases in 1723 Mr. Justice Fortescue relied on an extremely early precedent in support of the view of *audi alteram partem* as part of the visitor's duty. "God himself," said the learned judge, "did not pass sentence on Adam before the latter was called upon for his defence. 'Adam,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded that thou shouldest not eat?' And the same question was put to Eve also."<sup>5</sup> An example of the working of the remedy by mandamus is the issue of the writ to the visitor of Peterhouse in 1788, enjoining him to proceed to the election of a master owing to the failure of the fellows to elect.<sup>6</sup> A mandamus does not lie to a visitor to reverse

<sup>1</sup> This is put in to cover the decision in *R. v. Hertford College* (below).

<sup>2</sup> His jurisdiction is a *forum domesticum*, but still a *forum*.

<sup>3</sup> *Green v. Rutherford* [1750], the case of a devise of a rectory to St. John's, Cambridge, in trust for the senior fellow.

<sup>4</sup> See *Whiston v. Dean of Rochester* [1849], 7 Harc. 532; *R. v. Dean of Rochester* [1851], 17 Q. B. 1. The alleged interest of the visitor (the Bishop) was that he had connived at misappropriation of cathedral revenues by the Dean and Chapter.

<sup>5</sup> *R. v. Chancellor of Cambridge*, 1 Str. 566. The principle is illustrated by numerous other decisions. A good modern instance is *Wood v. Wood* [1874], L. R., 9 Ex. 190.

<sup>6</sup> *R. v. Bishop of Ely*, 2 T. R. 290.

his own decision,<sup>1</sup> or to a college to restore a fellow after deprivation by the visitor<sup>2</sup> or his commissary.<sup>3</sup> In the absence of any of the grounds above mentioned, the decision of the visitor is conclusive, whether as to a question of law or a question of fact.<sup>4</sup> He is not bound to wait for an application, but may act *mero motu* in a proper case. He cannot be judge in his own cause unless such power be specially given him.<sup>5</sup> In deciding an appeal he may properly take into consideration long and undisturbed possession of an office.<sup>6</sup> An example of the smaller questions which he may have to decide is whether a non-resident fellow may let his rooms.<sup>7</sup>

No appeal lies from the visitor unless he visits *qua* ordinary, when an appeal lies to the Crown in Chancery.<sup>8</sup> In the words of Lord Camden, visitation "is a despotism uncontrolled and without appeal, the only one of the kind existing in this kingdom."<sup>9</sup> But the Courts, as in the *Peterhouse Case*, will take care that he acts within any limitations contained in the statutes. Members or members elect of the college not claiming to be present or future foundationers have no right of appeal. If the college accept them, they are in the position of "mere boarders" (to use Lord Apsley's phrase), and their position is little better than

<sup>1</sup> *A.-G. v. Stephens* [1737], 1 Atk. 358.

<sup>2</sup> *Parkinson's Case* [1689], Carth. 92, a Lincoln College case, the Court holding that a fellow holds his fellowship on the implied condition of submission to the visitor.

<sup>3</sup> The visitor seems to have a general right of visiting by commission. In some colleges this was expressly provided by the founder.

<sup>4</sup> As a matter of practice in modern times, the visitor usually acts on legal advice if the question be at all an important one.

<sup>5</sup> *R. v. Bishop of Ely*, above, where held that statutory power to nominate a head on lapse does not constitute him a judge in his own cause.

<sup>6</sup> *Re Downing College* [1837], 2 Myl. & Co. 643.

<sup>7</sup> *A.-G. v. Stephens*, above.

<sup>8</sup> This is tantamount to saying that no appeal is now competent, for probably no visitor now acts *qua* ordinary.

<sup>9</sup> Grant, 534.

that of tenants-at-will.<sup>1</sup> At one time it was thought that only actual members of the foundation had the right of appeal.<sup>2</sup> But it is now settled that anyone claiming to be fellow, scholar, or otherwise on the foundation has the right.<sup>3</sup> A sentence of expulsion by the college, from which no appeal has been made, is conclusive, and is in the nature of a judgment *in rem* determining the status of the person affected.<sup>4</sup> It is a question whether a visitor can examine witnesses on oath.<sup>5</sup> He cannot, apart from statute, compel the attendance of witnesses. No precise mode of procedure is necessary, as long as substantial justice is done and opportunity given, generally by citation, to all parties interested to be heard.<sup>6</sup> He has a right to use the college hall or chapel, and exclusion by the college does not render the visitation ineffectual.<sup>7</sup> He may adjourn his quasi-court from time to time,<sup>8</sup> and may award costs between parties,<sup>9</sup> and charge his own on the college, such costs being liable to taxation.<sup>10</sup>

It is doubtful whether a power to interpret statutes, when conferred on a particular person, constitutes him visitor.

<sup>1</sup> *Ex parte Whrangham* [1795], 2 Ves. Jun. 617, as to a fellow-commoner; *Davison's Case* [1772], Cowp. 319, a petition to Lord Apsley, L.C., as visitor of University to restore an expelled commoner, on the ground that he had been expelled by a minority of the fellows; *R. v. Grundon* [1775], Cowp. 315, a case of expulsion of a commoner from University. This is but an example of the rule that a visitor's power exists only between member and member, not between member and stranger.

<sup>2</sup> The authority generally cited was *R. v. St. John's College, Oxford* [1693], Holt, 437.

<sup>3</sup> *R. v. Hertford College* [1878], 3 Q. B. D. 693. In this case Lord Coleridge points out, at p. 703, that the *St. John's Case* is no authority at all, for there a definite private right of property in the Mayor of Bristol had been interfered with by the college.

<sup>4</sup> *R. v. Grundon*.

<sup>5</sup> It was done in *Phillips v. Bury*, below, p. .

<sup>6</sup> *Summarie simpliciter et de plano sine strepitu aut figura judicii*, Com. Dig. Visitor, B.

<sup>7</sup> *Phillips v. Bury*, below.

<sup>8</sup> *Re Dean of York* [1841], 2 Q. B. 39.

<sup>9</sup> *Queens' College Case* [1820], Jac. 47.

<sup>10</sup> *A.-G. v. Dean of Christ Church* [1821], Jac. 487.

Probably not, as the provision in the Act of 1877, that the Chancellor of Cambridge is the interpreter of university statutes made under the Act, does not constitute him visitor of the university. In college statutes it is generally provided that he is the sole interpretative authority where any doubt arises as to the meaning of a statute.<sup>1</sup> He need not necessarily give a decision on the merits: he may hold that the appeal comes too late.<sup>2</sup> The visitor *qua* visitor, even when the Crown, appears to have no right to inspect the books of a university.<sup>3</sup> Whether he would have a right as such to inspect the books of the college visited by him, does not seem to have been decided. A college, besides being subject to visitation, may itself be visitor of a school.<sup>4</sup> The visitatorial authority of the Crown does not supersede the jurisdiction of the Chancery Division or prevent it from exercising its functions in respect of an existing trust.<sup>5</sup> The same result would follow *a fortiori* where the visitor is a subject. If a charity be founded by a subject and no visitor be appointed, and the Crown then by charter incorporate governors and authorise them to make rules, the Court will interfere and direct a scheme if the existing rules do not carry into effect the views of the founder.<sup>6</sup> In the case of a college, the same result seems to follow by the submission of new statutes to the Crown in Council. In the old statutes of Exeter and some other colleges a quinquennial visitation

<sup>1</sup> Before the first commission, as the report states, he sometimes relieved himself of difficulty by explaining away the statute or statutes.

<sup>2</sup> *R. v. Bishop of Lincoln* [1785], 2 T. R. 338n., opposition to election of Dr. Horner as Rector of Lincoln.

<sup>3</sup> *R. v. Purnell* [1748], 1 W. Bl. 37.

<sup>4</sup> As Caius of the Cambridge Free School. See *Protector v. Crayford*, [1656], Style, 457.

<sup>5</sup> *Daugars v. Rivas*, [1860], 28 Beav. 233. The case of *A.-G. v. Magdalen College* [1847], 10 Beav. 402, illustrates this point. The Master of the Rolls declined to interfere on an allegation of Magdalen College School of breach of duty by the college, as it was matter for inquiry by the visitor, there being no evidence of a trust.

<sup>6</sup> *A.-G. v. Dedham School* [1857], 23 Beav. 350.

was provided. Periodical visitations at stated intervals were recommended by the Report of the Cambridge Commission (1852); but this recommendation does not appear to have been carried out. As a rule, the visitor gives reasonable notice of an official visit, though he seems—apart from statute—in no way bound to do so.<sup>1</sup>

#### IV. *Government.*

The government of Oxford and Cambridge mainly depends on the three great constitutional Acts, the Oxford University Act 1854 (17 & 18 Vict., c. 81), the Cambridge University Act 1856 (19 & 20 Vict., c. 88), and the Universities of Oxford and Cambridge Act 1877 (40 & 41 Vict., c. 48). Other Acts of smaller importance will be noticed in their proper places. The constitution of the universities before the reforms of 1854 and 1856 will be found in the respective reports of the commissions published in 1852. The Act of 1854 replaced the Hebdomadal Board (established by Laud, and consisting entirely of heads of houses) by the Hebdomadal Council, but left Convocation almost unaltered. It also constituted the Congregation of the University,<sup>2</sup> consisting of certain university officials and resident members of Convocation.<sup>3</sup> The Hebdomadal Council (so called from its meeting once a week) is composed partly of *ex officio*, partly of elected members. It has the initiative in university legislation. Congregation can amend, confirm, or

<sup>1</sup> For the whole law of visitors, J. L. Dampier's statement appended to the Report of the Oxford Commission (1852), is one of the best sources. Older sources are A. J. Stephens, *Statutes relating to Ecclesiastical and Eleemosynary Institutions* (1845); Grant, 529; Tudor, *Charitable Trusts*; and various digests and abridgements, such as those of Comyn and Viner.

<sup>2</sup> This body is to be distinguished from the Ancient House of Congregation, which now exists only for the purpose of conferring degrees. The Cambridge Senate assembled for the purpose of business is called Congregation.

<sup>3</sup> The residence must be actual and not merely constructive, as by keeping rooms in college by a fellow who was incumbent of a country living (*R. v. Vice-Chancellor of Oxford* [1872], L. R., 7 Q. B. 471).

reject the Council's *projets de loi*, Convocation only confirm or reject. The Act of 1856 substituted the Council of the Senate for the *Caput Senatus*, but did not affect the Senate. The Oxford Convocation and the Cambridge Senate are nearly synonymous, both consisting of graduates of at least the degree of M.A., whose names are on the books of the university. The Act of 1877, s. 12, provided for the making by the Commissioners named in the Act, "in the interests of education, religion, learning, and research," of statutes for the universities and colleges, and for altering and repealing statutes, with an exception in favour of trusts, conditions, and directions made more than fifty years before the passing of the Act.<sup>1</sup> The object of the statutes is set forth in sects. 16—18, and affects the universities, the colleges, and the relation of the universities to the colleges. Under the authority of the Act new statutes for the universities and colleges were framed. Having been submitted to Parliament and approved by Order in Council, these have superseded most of the previous college statutes.<sup>2</sup> In the case of the universities a good deal of the old university legislation remains, especially of the Laudian statutes at Oxford. The university statutes deal with the professors and readers, the boards of faculties,<sup>3</sup> and the finances and accounts of the universities and colleges. The Act of 1877 constitutes the Chancellor of Cambridge (but for some reason not of Oxford), the court of construction of university statutes. College statutes framed under the Act deal with the internal economy of the colleges. They have as a general

<sup>1</sup> It may be doubtful whether the observance of "the main design of the founder" enjoined by sect. 14 has been in all cases observed.

<sup>2</sup> Except at Lincoln. See p. 271.

<sup>3</sup> Bulaeus defines *facultas* as *corpus et sodalitium plurium magistrorum certae alicui disciplinae addictorum*, 1 Hist. Univ. Paris, 251. The word *corpus* seems to imply that he regarded the faculty as a corporation, which it was at Paris and is in Scotland. Apart from this the definition meets the case of the faculty in an English university]

rule removed all clerical restrictions from headships<sup>1</sup> and fellowships,<sup>2</sup> have divided fellowships into official and prize, the latter being held for a limited period, generally seven years, and have thrown open many scholarships and exhibitions previously closed to particular schools or localities.<sup>3</sup> A fair idea of the scope of the statutes may be obtained by taking as an example those of Merton. The preamble gives a succinct history of the college. Then follow clauses dealing with the constitution of the college, the warden, fellows, postmasters,<sup>4</sup> and exhibitioners, the officers of the college, administration, tuition, pensions, contributions to the university, marriage of fellows,<sup>5</sup> disposition of revenue, accounts, and the visitor.

Among numerous other Acts dealing with government and constitution may be mentioned the following. The tendency of modern imperial and universal legislation has been to abolish oaths and substitute declarations, especially the declaration of fidelity by inceptors. The power depends

<sup>1</sup> Except Christ Church and Pembroke, Oxford, and St. Catharine's, Cambridge.

<sup>2</sup> It seems from an old case, *Moseley v. Warburton* [1697], 1 Ld. Raym., that a fellow of a college is not a beneficed clerk, though he is bound to be in holy orders.

<sup>3</sup> Founders' kin fellowships were mostly abolished under the powers of the Acts of 1854 and 1856. In modern times questions upon them rarely arise. Probably the latest is *A.-G. v. Sidney College*, in 1869, below. The Fereday fellowships at St. John's, Oxford, still give a preference to founder's kin. Jesus, Oxford, and other colleges still have fellowships and scholarships to which persons born in a particular district or educated at particular schools have a preference. For a bequest to any undergraduate of the name of Coleman, see *Coleman v. Benet College* [1673], Finch, 30. If a person goes to reside in a place temporarily, so as to give his son a preference, the qualification is good, *Etherington v. Wilson* [1875], 1 Ch. D. 160. For a recent example of a decision regarding close exhibitions—the Careswell Exhibitions at Christ Church, see *A.-G. v. Dean of Christ Church* [1894], 3 Ch. 524.

<sup>4</sup> A postmaster—said to be a corruption of *portionista*—corresponds to a scholar. Magdalen calls its scholars demies.

<sup>5</sup> Marriage is not now regarded in the same light as it was by the University of Vienna. Kink in his history of the university (1854) records an entry in the register of a graduate, who *uxorem duxit versus in demeniam*.



largely on 5 & 6 Will. IV, c. 62, s. 8. Quite a formidable amount of oaths were required in early times, and some survived down to little more than half-a-century ago. The oaths of allegiance, supremacy and abjuration, have been already mentioned. But there were many others, and nearly every college had its own special oaths. At Oxford every M.A. had to swear to refuse consent to the reconciliation of Henry Symeon<sup>1</sup> and to recognition of lecturing at Stamford, to which there had been a secession in 1334.<sup>2</sup> Both these oaths existed up to 1827. From 1423 to 1564 Oxford graduates took an oath against the doctrine of tithe promulgated by the Franciscan W. Russell.<sup>3</sup> The matriculation oath was abolished at Oxford in 1854, the matriculation and degree oath at Cambridge in 1856. The oaths required at Magdalen were described in the Report of the Commission as being "of elaborate length and awful solemnity." At Lincoln there was an oath against heresy. A commonly occurring oath binding fellows not to disclose any matter relating to the college and to resist any change was made illegal by the Acts of 1854 and 1856. In the case of refusal to take the proper oaths, a mandamus lay to the head to remove the recusant, the recusant being made a party.<sup>4</sup> The election of a President of Queens' was held not void because he took the necessary oaths before subscribing the declaration under the Act of Uniformity at that time enforced.<sup>5</sup> Dispensation from all or some of these oaths was frequently granted, in spite of an oath against applying for dispensation frequently occurring in college statutes. It was granted sometimes by the Crown, sometimes by Convocation, sometimes by the visitor, the last by a curious excess of authority, as one of his main duties is to see that the statutes

<sup>1</sup> The history of this seems unknown. (Lyte, 214.)

<sup>2</sup> 2 Rashdall, 688. For a similar oath at Bologna, see 1 Rashdall, 172.

<sup>3</sup> Little, 86.

<sup>4</sup> *R. v. St. John's College, Oxford* [1693], 4 Mod. 260.

<sup>5</sup> *Re Queens' College* [1837], Jac. 1.

are observed. In an interesting essay Bishop Fleetwood discusses, from the point of view of ethics, whether a fellow, swearing under statutes framed between 1440 and 1460 that he had no estate of inheritance of the value of five pounds a year, would be entitled to take into account the difference in the value of money. The bishop thinks that he would be.<sup>1</sup> In one case refusal of an oath tendered was treason. This was by 28 Hen. VIII, c. 10 (repealed in Mary's reign), enforcing an oath of abjuration of the Pope.

By 13 Eliz., c. 29,<sup>2</sup> the universities then existing were incorporated under the official titles of "The Chancellor, Masters and Scholars of the University of Oxford," and the same of Cambridge, with common seals and a right to sue and be sued in their corporate names.<sup>3</sup> 31 Eliz., c. 6, provided for the reformation of abuses and corrupt practices in the election of fellows, and for the reading of the Act at such elections. The Act is sometimes read on these occasions; but for the most part it seems to have tacitly fallen into desuetude. By 13 & 14 Vict., c. 98, deans of cathedrals, except the dean of Christ Church, cannot be heads of colleges. The Oxford City Council, the Cambridge Town Council and Watch Committee, the Education Committee, and the Guardians of the Poor, are subject to special legislation under which the university is represented on those bodies. The main Acts are the Oxford Police Act 1881, the Cambridge Award Act 1856, and the Cambridge University and Corporation Act 1894.

<sup>1</sup> *Chronicon Pretiosum* (1745).

<sup>2</sup> Called by Sir E. Coke "a blessed Act."

<sup>3</sup> It should be noticed that the official title is sometimes abbreviated in subsequent Acts. In 3 Jac. I, c. 5, and 13 Anne, c. 13, it is "The Chancellor and Scholars."

JAMES WILLIAMS.

## V.—THE ORIGIN AND GROWTH OF COPYRIGHT.

NO branch of English law has been more full of interest for the lay mind than that which deals with the legal rights of authors in their books. We have not far to seek for reasons. Not only is the history of Copyright law itself of much human interest, but also if it were not for certain statutory barriers which have been raised against authors and booksellers, our bookshelves would lose—or, rather, they would never have gained—many of their greatest treasures. We should be compelled to choose between penury of pocket on the one hand, or penury of mind on the other—or, as a last resource, we might (heaven forbid !) betake ourselves to the bethumbed copies in the local library. The Legislature, for having prevented the necessity of this, is worthy of the reader's gratitude.

Our English law affords us many instances of the ill results of petitioning. Certain classes, labouring beneath grievances, have petitioned Parliament to legislate in their favour, only to find, upon legislation being introduced in accordance with their request, that they have been made subject to restrictions and difficulties up till then unknown. So was it with the authors. They did not understand the legislative machinery which has too often abolished rights that it has intended to protect, and sown the seeds of discord where it would fain have sown the seeds of peace.

Copyright law has afforded for those who would be merry at the expense of the literary inclined, ample ground to base their belief, that authors are the most unbusinesslike of people. The reading public still think of Milton and the sale of *Paradise Lost*, of Johnson and the sale of *Rasselas*, of Goldsmith and the sale of *The Vicar of Wakefield*. Strange is it, however, that we seldom hear of the Act of Good Queen Anne's reign, which deprived authors and booksellers

of their right to publish the works which they owned without any limitation as to time. It was no piece of compulsory legislation introduced to remedy general defects. It was passed as a reply to the repeated and continuous petitions of authors and booksellers asking for legislative protection, in order to improve their methods of suppressing piracies.

Upon this, Mr. Augustine Birrell, with characteristic humour observes, in a delightful although too brief essay entitled, "Authors in Court": "No enemy did this; no hungry mob clamoured for cheap books; no owner of copyrights so much as weltered in his gore. The rights were unquestioned: no one found fault with them. The authors accomplished their own ruin: Never, surely, since the well-nigh incredible folly of our first parents lost us Eden and put us to the necessity of earning our living, was so fine a property—perpetual copyright—bartered away for so paltry an equivalent."

It may well fill us with amazement that at those times in which authors have attempted to obtain better provision for themselves, they have, in each instance, been thwarted and led toward the path of disaster, either by the actions of themselves collectively, or of some of their members individually.

But all else pales and becomes dim beside the Statute of Anne which came about as follows:—

To discover the origin of copyright, which, it may be remembered, was defined by Macaulay as "a tax on readers, for the purpose of giving a bounty to writers," we must go back to the first half of the sixteenth century. The Crown at that time claimed prerogative rights, in the case of certain books, to grant the sole privilege of printing them to its assigns. The King, as the Head of the State, exercised the exclusive right to print all Acts of State, Ordinances of the Council and the like; as the Head of the Church he

possessed the exclusive right to print the books, rites, and ceremonies of the Church.

Side by side with these royal privileges, there came to be recognised a sort of Common law right of property in an author or bookseller to his own literary efforts and work, provided that any exercise of such right did not affect those persons who had obtained a grant from the Crown. A work printed in the year 1523 by Wynkyn de Worde formed the subject of the first recorded dispute as to copyright. No sooner had this work attained popularity than a certain audacious printer, by name Trevers, reprinted it and sold copies at a price much below that of the author's edition. The author's second edition, published in the year 1533, protected by the privilege of the king, contained a vigorous attack on Trevers for having pirated a book which was exclusively the property of Wynkyn de Worde. The significance of this is evident. It indicates that, even at that early day, some proprietary right was considered to vest in the possessor of literary work.

By means of a Decree of the Star Chamber of the year 1556, the first great landmark in the history of Copyright law in England, the Stationers' Company was established. The Decree was issued mainly on religious grounds, the idea actuating the framers being that of hindering the propagation of the reformed religion. The most effective method was considered to be the imposition of the severest restrictions on the publications of the press. The charter recites "That certain seditious and heretical works, both in rhymes and tracts, are daily printed, renewing and spreading great and detestable heresies against the Catholic Doctrine of the Holy Mother Church." It authorised the incorporation of 97 persons mentioned by name as "The Stationers' Company." The Company was to keep register books in which the titles of all publications and reprints had to be registered. Authority was given to the Master

and Warden to seize and burn all books printed contrary to their regulations, and to imprison anyone who should exercise the art of printing in any other manner than that which the Company directed. .

The person who had registered his rights in the books of the Company was the owner, and he might assign those rights to others, provided the title of the assignee was also entered on the register. The owner was protected from piracies by the Company, who would not hesitate to enforce their authority. Printing was thus made a monopoly of members of the Company. No early decisions in the law Courts as to illegal printing can be found, the reason being that, with these summary powers of seizure and burning, appeals to Courts of law were rendered unnecessary.

Queen Elizabeth confirmed this Charter.

On the 14th June, 1645, the Long Parliament passed an "Act for redressing Disorders in Printing," which re-enacted earlier provisions and imposed further stringent penalties upon those who violated the regulations of the Company. This Act required the consent of the owner before any book could be reprinted. If a book were pirated the printer would be liable on the one hand, to penalties for piracy, on the other hand, to the penalties for unlicensed printing. These were the halcyon days of authors. Their weapons wore a double edge.

Pamphleteers were next to come beneath the sheltering wings of the Legislature. Two Acts of the years 1647 and 1649 required pamphlets to be licensed and entered on the register of the Company. The latter Act is well worth reading, if for nothing else, at least for the violence of its language. It contains a lengthy preamble concerning "unlicensed and scandalous books and pamphlets"; the "ignorance and assumed boldness of the weekly pamphleteer"; and "the irregularity and licentiousness of printing, the art whereof in the Commonwealth and in

all foreign parts hath been sought to be restrained from too arbitrary or general use."

The next link in the chain is the Licensing Act of 1662. It further extended the regulations to be observed, and, amongst other things, it ordered that no persons should presume to print any books which contained doctrine, or opinion, contrary to the Christian Faith or the discipline of the Church of England, and it gave stronger powers to the Master and Wardens of the Stationers' Company to seize books containing matter hostile to the Church or Government.

This Act aroused the ire of authors and others. The discontent that had been smouldering for some time, burst into a flame and burned fiercely throughout the land. The authors strenuously complained that the large sums of money asked by the Company for making entries, the refusal at times to make entries, and the erroneous entries only too frequently made, injured their property. So far did these objections go, and so strong did they become, that upon the question arising in the House of Lords, as to whether this Act should be renewed, we find that one of the reasons advanced against its renewal was "that the Act destroys the property of authors in their copies." These words in the light of later legislation, wore a prophetic cloak. Probably some of those who raised their voices in lamentation, foresaw that the future was full of difficulty, and, perhaps, disappointment.

The Licensing Act expired in the year 1694. It must be remembered that, so far, there had been no statute expressly creating, or judicial decision expressly recognising, the property of an author in his books. True, there had been several Charters and Statutes, giving the Stationers' Company authority over printing and licensing works, but there had been no legal recognition of Copyright as such. All the customs, usages, and regulations were, of course,

strong and conclusive evidence of the existence of the Common law right of an owner of "copy" to publish his work perpetually, without any restriction whatsoever.

So universal were these customs, that it might have been expected, that a Court of law would recognise this Common law right, both before and after publication. This was the opinion of three judges to one, in the famous case of *Millar v. Taylor*,<sup>1</sup> and of eight judges to four in the even more famous case of *Donaldson v. Beckett*.<sup>2</sup>

The lapse of the Licensing Act cast authors and proprietors of copies into the slough of despond. Its provisions they had supported with impatience and relinquished with reluctance. Instead of being able to impose penalties for infringement, to seize and burn copies which had been pirated, they were left to their Common law remedy, *i. e.*, an action of "trespass on the case." They were compelled to sue for the actual pecuniary damage they had sustained.

Authors and booksellers were in arms. In the year 1703, and again in 1706 and 1709, they petitioned Parliament for a Bill to protect them against what they pathetically called, "Ruin." They said that, "At Common law a bookseller can recover no more costs than he can prove damages; but it is impossible for him to prove the tenth or hundredth part of the damage he suffers, because a thousand different copies may be dispersed into as many different lands, and he is not able to prove the sale of ten; the defendant is always a pauper," and they therefore prayed "that the confiscation of counterfeit copies might be one of the penalties imposed on offenders."

The petitions resulted in the notorious Statute of Anne,<sup>3</sup> the first Copyright law that the world had known. It said, an author and his assigns should have the sole right of printing new books for fourteen years, and, if at the end of that time, the author should still be alive, he was to have

<sup>1</sup> [1769], 4 Burr. 2303.    <sup>2</sup> [1774], 4 Burr. 2408.    <sup>3</sup> [1709], 8 Anne, c. 19.



the right for another fourteen years. In the case of books already existing there was to be but one term, viz., twenty-one years from August 10th, 1710.

This enactment was destined to become the parent of one of the greatest and bitterest controversies known to English law. Ill-considered, ill-drawn, destroying the very property it was intended to protect, this perfidious measure, "rigged with curses dark," ruined the whole case of the British author.

Prior to this, events in general had been for, and not against, the author. But alas! as a writer upon Copyright says, "how annoying, how distressing, to have evolution artificially arrested, and so interesting a question stifled by an ignorant Legislature, set in motion not by an irate populace clamouring for cheap books, (as a generation later they were to clamour for cheap gin), but by the authors and their proprietors, the booksellers." The booksellers hastened to remonstrate. They said that they had paid authors large sums of money, to have the perpetual right of publishing their books. This was naturally doubted. A bookseller paying for prosperity, would, indeed, be a singular phenomenon. The tradition is, that the Bill was originally drafted by Dean Swift (who we remember from his *Memoirs relating to the change in Queen Anne's Ministry*, and also his letters to Stella, was frequently present at Cabinet meetings), solely in the interests of authors and booksellers.

Too much calumny has already been hurled at the head of the fiery Dean for us to wholly believe in this tradition. Let us, if possible, acquit the author of *The Battle of Books* of this. The Act imposed the desired penalties, and it was thought that the times mentioned in the Act merely meant that the imposition of such penalties was only to exist for the periods named, by way of experiment. The authors generally believed that the Statute did not interfere with their Common law right, to publish in perpetuity their literary property.

They were soon to be undeceived. Peace reigned in the author's land for the space of twenty-one years. Books already published had that period allowed them. Then commenced the thirty years' war. • It was a splendid fight. Big lawyers, big fees. The booksellers versus the pirates. The whole question resolved itself into this:—"Did the Common law right of an author or bookseller to publish his literary property in perpetuity, survive the time limitations imposed by the Statute of Anne?"

This was the question around which there raged one of the fiercest storms in the annals of legal history.

In the year 1735, the case of *Eyre v. Walker*<sup>1</sup> was decided by Sir Joseph Jekyll. Mr. Eyre sought an injunction to restrain the defendant Walker from publishing editions of that old, but well-remembered book, *The Whole Duty of Man*. An injunction was granted. This was equivalent to saying that the Common law had survived the Statute, or, in other words, that an author had in spite of the Act a right to publish his works perpetually, and to restrain a piracy even after the Statutory limitation had expired. In the same year, in the case of *Motte v. Falkner*,<sup>2</sup> the defendant was restrained from printing Pope's and Swift's *Miscellanies*, published in the years 1701, 1702 and 1708 respectively, and thus outside the Statutory term. Then followed the case of *Tonson v. Walker*,<sup>3</sup> in which the defendant was restrained from pirating *Paradise Lost*.

Things looked well for the authors. Next came the celebrated case of *Millar v. Taylor*. The poet Thomson had sold *The Seasons* to one named Millar. Taylor, the defendant, pirated the poem, and Millar sought an injunction to restrain him. It was held, by three judges to one, that the Common law right was not taken away by the Statute of Anne, and thus the defendant was restrained.

So far Equity had smiled on the Common law. The

<sup>1</sup> 4 Burr. 2325.

<sup>2</sup> *Ibid.*

<sup>3</sup> [1752] 3 Swans. 672.

universal opinion had hitherto been entirely in favour of the Common law right of the author. Decisions to this effect had been delivered by the ablest judges on the Bench.

Then came an appeal to the House of Lords in the case of *Donaldson v. Beckett*. A perpetual injunction had been granted against the defendant in the year 1774. It was held, that, even if there had been a right to perpetuity in literary property at Common law, it was destroyed by the Statute of Anne, and, that any proprietor of copyright had the exclusive right of multiplication only during the periods of time allowed by the Statute.

Thus was the perpetual ownership of authors in their literary productions swept away. All the previous privileges counted for nothing. To some extent, authors were indebted to Lord Camden for this decision of the House of Lords. He, it was, who moved the House to give judgment for the appellant and against the Common law right. His Lordship, who was not an author, although his aspirations may have turned in that direction, became exceedingly wrathful at the thought of pecuniary gain resulting from literature. "It was not for gain," says he, "that Bacon, Newton, Milton and Locke instructed the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letterpress. When the bookseller offered Milton five pounds for his *Paradise Lost* he did not reject it and commit his poem to the flames, nor did he accept the miserable pittance as the reward of his labour. He knew that the real price of his work was immortality, and that posterity would pay for it."<sup>1</sup>

What could the Peers do against such eloquence as this? Had Mr. Serjeant Talfourd, who was later to become the authors' friend and the booksellers' benefactor, been a member of the House of Lords at this time, events might have had a different ending; at any rate, the case for the authors and booksellers would have worn a different aspect.

<sup>1</sup> 17 Cobbett, *Parl. Hist.*, 1000.

Lord Camden totally disregarded the bye-laws, proclamations, entries and assignments, as forming the basis of a Common law right. He stated, truly, that there was no judicial decision expressly creating a Common law right; but to have laid aside the almost conclusive evidence of such right as unimportant appears to be strangely inconclusive. However, so it was, and authors grieved afresh.

In the year 1775 the universities, alarmed at the decision, obtained an Act granting them perpetual copyright in books given to them for the advancement of learning and education.<sup>1</sup>

In the year 1814 an Act<sup>2</sup> was passed, which extended the periods of monopoly allowed by the Statute of Anne. It enacted, that authors should have the sole liberty of printing and reprinting their works for twenty-eight years to commence from the day of publication; and further, that if the author should be living at the expiration of that period, for the residue of his natural life.

The year 1842 saw the Copyright Act<sup>3</sup> passed, upon which the law of literary copyright now depends. For many reasons the time could not have been more propitious for extending the periods of copyright. Many of the members of Parliament were impressed by the petitions they had received. They naturally would think of Scott, who, just at the time when he was about to reap the reward of his early and most successful novels, died, leaving his family in great financial difficulty,—for his copyrights had expired. They would think of Wordsworth, who just at the time when his poems were becoming popular, found that they belonged to everyone, as well as to himself. They would think of Southey, who constantly found himself ill at ease in the presence of his creditors, and whose literary career was known to have been much altered by his pecuniary needs, which arose owing to the shortness of his

<sup>1</sup> 15 Geo. III, c. 53.

<sup>2</sup> 54 Geo. III, c. 156.

<sup>3</sup> 5 & 6 Vict., c. 45.

copyrights. They would also, no doubt, bear in mind the petition of "Thomas Carlyle, a writer of books," who set before the House "that your petitioner has written certain books, being incited thereto by certain innocent and laudable considerations; that his labours have found, hitherto, in money or money's worth, small recompense or none."<sup>1</sup> The time was ripe for legislative lenience. The Act said that Copyright should exist for "forty-two years from publication, or until seven years from the death of the author, whichever shall be longest." The gratitude of all authors is due to Mr. Serjeant Talfourd for this excellent enactment.

At a time when it appeared that authors were to approach a little nearer to their just rewards, when the future was about to become rosy with the hue of success, there sprung from the serried ranks of the opposition, in the debates upon this Bill, the great figure of Macaulay. By his unrelenting opposition to the extension of the period to sixty years' publication, he was eventually successful in moulding it to the shape which it came at last to assume upon the Statute book.

It was said at the time that "Literature's own familiar friend in whom she trusted, and who has eaten of her bread, has lifted up his heel against her." The influence wielded by Macaulay justifies his biographer in saying that "Never has any public man, unendowed with the authority of a minister, so easily moulded so important a piece of legislation into a shape, which so accurately accorded with his own views, as did Macaulay the Copyright Act of 1842."<sup>2</sup>

Talfourd's speech, on introducing the Bill, rises to a pitch of eloquence worthy the occasion. More forcible, more cogent, and withal more eloquent arguments it would be difficult to imagine than those employed by the learned Serjeant. He concludes with these words, commenting upon the short period of twenty-eight years' copyright:—"There is something peculiarly unjust in bounding the

<sup>1</sup> Carlyle, *Miscellaneous Essays*.

<sup>2</sup> Trevelyan's *Macaulay*, II, 133.

term of an author's property by his natural life, if he should survive so short a period as twenty-eight years. It denies to age and experience the probable reward it permits to youth—to youth, sufficiently full of hope and joys, to slight its promises. It gives a bounty to haste, and informs the laborious student, who would wear away his strength to complete some work which 'the world will not willingly let die,' that the more of his life he devotes to its perfection, the more limited shall be his interest in its fruits. It stops the progress of remuneration at the moment it is most needed; and, when the benignity of nature would extract from her last calamity a means of support and comfort to the survivors—at the moment when his name is invested with the solemn interest of the grave—when his eccentricities or frailties excite a smile or a shrug no longer—when the last seal is set upon his earthly course, and his works assume their place among the classics of his country—your law declares that his works shall become your property, and you requite him by seizing the patrimony of his children."

With the exception of the International Copyright Acts, no further legislation has applied to literary copyright. In the year 1900 a Bill was introduced into the House of Lords and referred to a Select Committee, which, after taking evidence, reported the Bill to the House with suggested amendments; but nothing further has been done.

W. F. WYNDHAM BROWN.

## VI.—COMMUNICANTS AND THE DECEASED WIFE'S SISTER'S ACT 1907.

THE Deceased Wife's Sister's Marriage Act<sup>1</sup> 1907, which came into operation upon the 28th August of that year, has soon become the subject of judicial interpretation. Upon the 23rd July last, Sir Lewis Tonna Dibdin, as Dean of the Arches, delivered his judgment in the case of *Banister v. Thompson*, a suit in which the question was raised whether, in the circumstances which existed, the defendant, a clergyman of the Church of England, was justified in refusing the Holy Communion to the promoters of the suit. The facts of the case are short, and were not in dispute. The promoters of the suit, Alan Neville Banister and Emily Blanche Banister, are members of the Church of England, and reside in the parish of Eaton in the diocese of Norwich. The defendant is the Reverend Henry Thompson, Vicar of the the said parish of Eaton, and an Honorary Canon of Norwich Cathedral. In August 1907 the promoters went to Canada—Mr. Banister being then a widower, and the other promoter being his deceased wife's sister—for the purpose of endeavouring to contract marriage, and upon the 12th of that month they went through a ceremony of marriage at a Presbyterian Church in Montreal. As the parties were domiciled in England, and the Deceased Wife's Sister's Act 1907 did not come into operation until the 28th August, *i.e.*, sixteen days after the performance of the ceremony, it follows that the marriage was illegal at the time of the celebration and so remained until the passing of the Act in question, by the retrospective operation of which, as we shall see, it became validated as a civil contract. The promoters returned to England in September 1907. A correspondence took place between Mr. Banister and the defendant as to the admission of the promoters to the Holy

<sup>1</sup> 7 Edward VII, cap. 47.

Communion, and upon the 24th of October the defendant formally, in writing, informed Mr. Banister that if he and Mrs. Banister presented themselves for Holy Communion, he (the defendant) would refuse to Communicate them. It does not appear whether the promoters did actually present themselves or not; but this is immaterial, as both sides treated what had occurred as equivalent to repulsion, and the learned judge also so regarded it. The suit was promoted under the Church Discipline Act 1840 against the defendant in respect to an ecclesiastical offence, alleged to have been committed by unlawfully repelling the promoters from Holy Communion, and was brought to the Court of Arches by letters of request from the Bishop of Norwich. The two points taken for the defence are thus summarised in the judgment:—

1. The promoters were at the date of their repulsion, by reason of their marriage and subsequent cohabitation, open and notorious evil livers.

2. The Deceased Wife's Sister's Marriage Act 1907 expressly protects a clergyman from liability in respect of action by him which, if the Act had not been passed, would be justifiable; if the Act had not passed the promoters would have been persons living together matrimonially without being husband and wife, and ought to have been repelled; therefore, the defendant has incurred no liability by now repelling them.

The learned judge, in his judgment, after epitomising the facts, tersely puts the case presented for his determination as follows:—

By 1 & 2 Edw. VI, c. 1, s. 8, it is enacted that a clergyman "shall not without a lawful cause deny the same (*i.e.* the Sacrament) to any person that will devoutly and humbly desire it." The answer to the present suit is that the defendant, by reason of the circumstances I have stated, had a lawful cause for refusal of the Sacrament to the promoters, and whether this is so or not is the question which I have to decide.

It is evident that in a case where a clergyman is requested



to Communicate persons circumstanced as the promoters were, two questions arise: Firstly, is the clergyman justified in complying with the request, if willing to do so? Secondly, if unwilling, is he compellable to do so? The learned Judge treated the first question as dependent upon the rubric prefacing the Office of Holy Communion in the Book of Common Prayer, which provides that if any intending communicant "be an open and notorious evil-liver or have "done any wrong to his neighbours by word or deed so that "the congregation be thereby offended, the curate having "knowledge thereof shall call him and advertise him that in "anywise he presume not to come to the Lord's table until "he hath openly declared himself to have truly repented "and amended his former naughty life that the congrega- "tion may thereby be satisfied which before were offended." After a lengthy exposition of the marriage law in general, the matter, so far as the point now under consideration is concerned, is summed up by the Dean as follows:—

My duty is confined to ascertaining whether those who have contracted such a marriage are open and notorious evil livers and are offending the public conscience by their evil life. Taking the fullest account of the limiting effect of the words of the statute, and putting at its highest the divergence which the Act may have created between the action of the State and the rule of the Church of England, I find it impossible to say that these persons, lawfully married according to the law of the land, can by any reasonable use of language be so described merely because they are living together as man and wife.

It is not our intention to discuss the conclusion arrived at by the Dean on this part of the case, the questions involved being purely matters of ecclesiastical law requiring for their determination much historical knowledge and a profound acquaintance with the principles and practice of the Canon law. Some reference, however, to the first point taken for the defence, and the decision thereon, was a necessary preliminary to the consideration of the second point, which it is the purpose of this article to discuss. It must be remembered that what the Judge had finally to decide was

whether Canon Thompson was under an obligation to administer the Holy Communion to the promoters, and that it was incumbent upon him to determine both the points raised for the defence adversely to the defendant before the promoters could succeed. The second point is, as the learned Judge says, "a pure question of construction of the Act of Parliament," and is, we think, one which may be discussed without any special knowledge of Ecclesiastical law. We give in full the first paragraph of sect. 1 of the Act which contains the proviso upon which so much turns:—

No marriage heretofore or hereafter contracted between a man and his deceased wife's sister within the realm or without shall be deemed to have been or shall be void or voidable as a civil contract by reason only of such affinity: Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty or censure, he would not have been liable if this Act had not been passed.

The charge against Canon Thompson was, very definitely, in respect of something "done or omitted to be done by him in the performance of the duties of his office." Sir Lewis Dibdin, in dealing with this branch of the case, assumes, to quote his own words, "that a man domiciled in England "living matrimonially with his sister-in-law was (notwithstanding any marriage ceremony) before the Act, and would "be now but for the Act, an open and notorious evil liver "who ought not to be admitted to Holy Communion." If, before the Act, the promoters were persons "who ought "not to be admitted to Holy Communion," it follows *ex necessitate* that a clergyman repelling them could not for so doing be liable to "any suit, penalty or censure, whether "civil or ecclesiastical!" Now the proviso, as we have seen, enacts "that no clergyman in holy orders of the Church of "England shall be liable to any suit, penalty or censure, "whether civil or ecclesiastical, for anything done or "omitted to be done by him in the performance of the

"duties of his office, *to which suit, penalty or censure, he would not have been liable if this Act had not been passed.*" (The italics here as elsewhere are our own.) It seems at first glance difficult to escape the conclusion that Canon Thompson was within the language of the proviso, the charge against him being in respect of something "omitted to be done by him in the performance of the duties of his office," and the "suit" of the promoters together with the "penalty or censure" sought to be inflicted, being such as Canon Thompson "would not have been liable" to if the Act had not been passed. This apparently obvious interpretation of the statute is, however, held by the Dean not to be the right one, and in his opinion the general words of the proviso are referable (in his own words) "to the duties of a clergyman incident to the actual marriage." We give the whole of the paragraph in which this quotation occurs:—

In my opinion, formed after anxious consideration of the Act, and not without some doubt and hesitation, the general words of the proviso must be limited to the particular purpose of the section, and are *referable to the duties of a clergyman incident to the actual marriage.*

The following passage from the judgment gives comprehensively the process of reasoning by which this result is reached:—

The words of the proviso are undoubtedly very wide, but, being a proviso, it must be construed with reference to the clause to which it is appended, *i. e.*, the first part of the section. *The subject-matter of the section is marriages contracted between a man and his deceased wife's sister.* The proviso under review is followed by two other provisos, *and they both relate to the actual marriage*, one dealing with the use of churches for its solemnization, and the other providing for cases where such a marriage has been annulled or has been followed by a lawful marriage before the passing of the Act. This suggests the inquiry whether the proviso in question can be given a reasonable meaning if restricted in the same way—namely, to the actual marriage and its incidents.

We were for some time in doubt as to the precise meaning intended to be conveyed by the expression "the subject-matter of the section is marriages contracted between a man

and his deceased wife's sister." The subject-matter of not only this section, but of the whole Act is marriages so contracted. The Dean adds, "but for the proviso a clergyman " would be under legal obligation to proclaim the banns of " a marriage between a man and his deceased wife's sister, " to solemnise the marriage, and to register it in the parish " register (*Agar v. Holdsworth*, 2 Lee, 515). The proviso was " required, and is efficient to free him from these obliga- " tions." We infer from this and other like passages, and from the context generally of the judgment, that the Dean's meaning is that the section in question, and consequently the proviso, are concerned only with the solemnization of the marriage and matters incidental to the ceremony, such as publication of banns and registration.

The gist of the argument is then sufficiently plain. The immunity of the clergyman from liability, secured by the first proviso, is couched in language wide enough to include the case of Canon Thompson, but it must be cut down and confined to matters relating to the actual solemnization of the marriage and its incidents, because the section to which it is appended (so it is argued) is limited to the same subject-matter. This reasoning is obviously dependent for its validity upon the soundness of the construction which so limits the meaning of the section. There is not, so far as we can see, anything in the language of the section which supports the theory that it is dealing only or even primarily with the solemnization of the marriage, or the actual marriage (whichever phrase may be employed) and its incidents. What strikes one rather is, that the section is dealing with the status of the parties to the marriage; with their ability to enter into the contract. The disabling effect of the existence of affinity in a certain degree between the parties is removed. Whilst, before the Act, parties so related were incapable of entering into the contract of marriage, such disability is now taken

away. There is nothing to indicate that the mind of the Legislature was concerned as to the ceremony of the marriage and its incidents. The Act was required for no such purpose, but merely to remove the disabling effect attaching to the persons by reason of a certain degree of affinity. The wide scope of the section seems singularly inconsistent with the notion that it has in view solely the actual marriage and its incidents. It expressly applies to marriages contracted "heretofore" as well as "hereafter," whether "within the realm or without," but no reference is to be found to the mode of solemnization or to the ceremony. It may be celebrated in accordance with the rites of the Established Church, in a Nonconformist Chapel, at the Office of the Registrar, or in any manner within the realm or without, in which a legal marriage may be solemnized. Assuming, as argued in the judgment, that the proviso must "be construed with reference to the clause to which it is appended,—that is the first part of the section,"—the difficulty is to discover anything in the latter to restrict its application to the mere solemnization of the marriage and its incidents, apart from the effects and consequences flowing naturally and inevitably from the validation of the union as a legal marriage. Let us re-state the argument which we are endeavouring to combat. The proviso says in substance that no clergyman is to be liable for any act or omission in the performance of the duties of his office for which he would not have been liable had the Act not been passed. The defendant would not have been liable before the Act for repelling from the Holy Communion the promoters, and therefore his case comes—*prima facie* at any rate—clearly within the express language of the proviso; but, the argument runs, the section itself relates to the actual marriage and its incidents, and the proviso must therefore be restricted in a like manner. The validity of this reasoning may well be tested by the simple

question, How do the promoters become persons eligible at all for reception of the Holy Communion? The answer is, by reason of this section of the Act which validates their marriage previously illegal. The removal of their prior incapacity is due to the operation of the section, there being nothing else in the Act touching the question. So that the enactment, upon which the proviso is to operate, implicitly enables the parties, otherwise disqualified, to receive the Holy Communion, and this is the only source from which they derive the right. This being so, we fail to see, upon what ground a proviso which in terms is not limited can be construed as inapplicable to a state of things arising necessarily out of the enactment to which it is appended. A very forcible argument in support of the view for which we are contending is to be found in the fact that the Act contains no express enactment legitimating the offspring of these marriages, leaving that to follow as the necessary result of validating the union. Had the intention of the Legislature been to restrict the operation of the proviso to "the duties of a clergyman incident to the "actual marriage," as declared by the judgment under review, it is inconceivable that language should have been employed which in the clearest terms professes to leave the clergyman *in statu quo* so far as "anything done or omitted "to be done by him in the performance of the duties of "his office" is concerned. The construction of the Dean seems to us to require the insertion in the proviso after the word "office" some such words as "in relation to the "solemnization of any such marriage and its incidents." We cannot see that the other two provisos to sect. 1 afford much assistance in the interpretation of the section or of the first proviso. Supposing the second and third provisos to relate, in the exclusive sense contended for, to the actual marriage, a suggestion which we are not prepared to admit so far as the third is concerned, it is not

apparent how this limitation with regard to the subject matter of a proviso could work a like limitation as to the subject-matter of the section. The only inference which it seems legitimate to draw from a proviso, as to its effect upon the meaning of the section to which it is appended, is that the thing provided against would otherwise be within the meaning of the section. It is difficult to conceive how a proviso, whose function professedly is simply to limit and qualify the enactment, by excluding from its operation some particular case or class of cases, can have the effect of limiting the comprehensiveness of the enactment in regard to matters altogether outside the scope of the proviso, and, as a consequence, limiting the operation of an independent proviso. We find it, at the same time, impossible to agree with the Dean that the two other provisos "both relate to the actual marriage." With regard to the third, it seems to us that this is certainly not so. This proviso exempts from the operation of the section two cases which, it must be assumed, would be otherwise within its scope. It enacts, firstly, that any marriage of the kind under consideration which may have been annulled before the Act, shall be deemed to have become void upon the date of annulment; and secondly, that where either party to any such marriage shall, during the life-time of the other party, have lawfully married another before the passing of the Act, the first marriage shall be deemed to have become void upon the date of the second marriage. It is difficult to appreciate the idea that this refers only "to the actual marriage and its incidents," such as proclamation of banns, solemnization of the marriage, and its registration in the parish registry. The object is clearly to provide, in these two instances, against the consequences of validating the otherwise invalid marriage. In one of the cases provided for, the effect of the section, if unqualified, might have been to invalidate a perfectly regular and legal marriage; hence

the need for the proviso to preserve the validity of the second and hitherto legal marriage. The proviso, so far from being restricted to the actual marriage—*i.e.*, the marriage validated by the Act—and its incidents, has for one of its objects the preservation of another marriage from invalidation by force of the Act.

The Dean invokes in support of his conclusion the well-known canon of construction "that you must not construe words so as to take away statutory rights *which existed before the enactment containing the words in question was passed*, unless the words plainly indicate the intention of the Legislature to take away such rights," and the dictum of Bowen, L.J., in *In re Cuno*<sup>1</sup> is cited. "The proviso," the Dean adds, "contains no mention of the right to receive the Holy Communion, and does not in terms deprive any one of this right who, apart from the proviso, would be entitled to enjoy it." The general principle here laid down is incontestable, but the words italicized disclose to our mind its irrelevancy to the present question. The statutory right did not exist before the date of the enactment we are considering, as, at that time, the promoters were admittedly ineligible. The right is claimed under and by virtue of sect. 1 of the Act, part of which is the proviso in question; and both section and proviso come into operation at one and the same moment of time, thus leaving no room for the application of the general principle relating to pre-existing rights. If the immunity from obligation to administer the Holy Communion, claimed by virtue of the proviso, is to be denied on the ground that to so construe the proviso would be to take away pre-existing rights, by parity of reasoning immunity from obligation to perform the marriage ceremony must be refused, as the proviso makes no mention of the right to be married, "and does not in terms deprive anyone of this right who, apart

<sup>1</sup> L. R. [1889], 43 Ch. Div. 12, at p. 17.



“from the proviso, would be entitled to enjoy it.” The judgment, however, allows that the proviso entitles the clergyman to refuse to celebrate the marriage. Why then should it not entitle him to refuse to administer the Holy Communion? Of course, had the proviso expressly deprived persons, circumstanced as the promoters, of the right to receive the Holy Communion, there would have been no room for discussion at all—*cadit-quæstio*; but we have a further quarrel with this piece of reasoning, inasmuch as without warning a term is introduced—namely “the right to receive the Holy Communion”—which shifts the whole ground of the argument. We are not debating whether the persons have a right, or, as we prefer to say, are eligible to receive—this much is conceded for the purposes of the present argument, in deference to the decision on the first point of the defence—what the discussion is now concerned with is, whether an individual clergyman is bound to administer. There is no necessary correlation between the right or eligibility of the parties and the obligation of any individual clergyman. The proviso is admittedly effective to relieve the clergyman of the obligation to perform the marriage, although sect. 1 gives the parties the right to marry, and this notwithstanding that the proviso contains no reference to the subject. The contention of the defendant in his second point was based upon an analogous construction of the section with respect to the administration of the Holy Communion, and had no reference to the question of the right to receive.

We come now to consider the argument based upon the absurd consequences which, it is suggested, would ensue from the adoption of the defendant's contention. The following quotation, though not containing all the illustrations given by the Dean, will we think suffice to show the trend of his argument, and to render intelligible the criticisms which we shall venture to offer:—

I observe further that unless some limitation is to be placed upon its (the proviso's) apparently unrestricted terms, almost absurd consequences result. As

Mr. Errington pointed out in his argument, *if the clergyman may act in all respects exactly as he could have done if the Act had not been passed*, he could assist a man who had married his deceased wife's sister to contract a bigamous marriage with another woman by proclaiming his banns, solemnizing the marriage in church, and registering it, thus actively aiding and abetting in the commission of a felony.

There are probably few enactments which, if construed strictly and literally, would not be productive of absurd consequences. Such absurdities are avoided by observation of the elementary rule, "that a thing which is within the letter of a statute is not within the statute unless it be also within the real intention of the Legislature." (Bac. Ab. Statute (1) 5.) It is a presumption of law that statutes are not intended to over-ride general principles. The Statute 12 Car. II, c. 17, which enacted that all persons presented to benefices in the time of the Commonwealth, and who should conform as directed by the Act, should be confirmed therein, "notwithstanding any act or thing whatsoever," did not, in spite of the generality of the words, apply to a person who had been simoniacally appointed.<sup>1</sup> We cannot conceive any enactment, however general in its language, being so construed as to protect a clergyman in the crime of aiding and abetting the commission of a felony. The only conclusion which can be drawn from the fact that a literal construction leads to absurd consequences is, that the literal is not the proper construction of the enactment. It helps in no way in the delimitation of the Legislature's intention. Neither does it prove anything with regard to any other case which, being within the words, is alleged to be also within the meaning of the statute. Indeed the *argumentum ad absurdum* seems only to be employed by the dean for the purpose of proving that *some* limitation must be placed upon the comprehensiveness of the language of the proviso. This may be willingly conceded. The question here is not whether the words are to have *any* limitation attached to their meaning, but whether the limitation placed upon them by the judg-

<sup>1</sup> *Crawley v. Phillips*, 1 Sid. 222.

ment does not defeat the real intention of the Legislature. This intention seems fairly clear. Certain marriages previously incestuous are made civilly valid. A clergyman of the Church of England, as by law established, is, from the fact of such establishment, bound by law to perform certain ecclesiastical functions for all qualified persons desiring them. Amongst such functions are the celebration of marriage and the administration of the Holy Communion. The statute, we are assuming in accordance with the judgment, would, by validating the marriage in question, were there no proviso, impose upon a clergyman the obligation to perform the marriage ceremony and to administer the Holy Communion. The ecclesiastical aspect of the marriage is, however, not touched by the statute, and the proviso was necessary in order to protect the conscience of any clergyman who might object, in the performance of his spiritual functions, to recognise as valid a marriage which the law of his church deemed null and void. Is there not here a key to the scope and intendment of the proviso? It does not appear reasonable to say to a clergyman: "because it wounds your conscience you need not marry these people; you need not even lend your church for the purpose; you need not perform even such a purely ministerial act, in connection with the marriage, as that of making an entry in the registry; but if they proceed to the next parish or to a registry office and procure a celebration of the marriage, you must then, in the performance of the most sacred of the duties of your office, treat the marriage as valid." This, we can well conceive a clergyman thinking, would be to mock, and not to protect, his conscience. On the other hand, we cannot see what hurt the conscience of a clergyman could sustain by his bowing to the obligation, as a good citizen, to abstain from actively assisting to bring about a marriage regarded by the State as bigamous and felonious, whatever the view which the Ecclesiastical law might take of the union.

We have not been able to discover any force in the illustration based upon the rubric providing for the celebration of the Holy Communion at the marriage ceremony. The Dean says that if the interpretation contended for be maintained, parties might be married by a clergyman and receive the Holy Communion from him, and yet be afterwards repelled by another (or even the same, if he had changed his mind). Certainly this is so; but wherein lies the force of the argument? With regard to the marriage ceremony itself, the vicar of the parties' own parish may refuse to perform it, or to lend his church for the purpose, and yet the vicar of the adjoining parish may do both. It does not appear to be a greater anomaly, that one clergyman may repel from the Holy Table and another may not, than that one clergyman may refuse and another may consent to perform the marriage ceremony. Such anomalies are due to the option given, by the statute, to a clergyman to act or not as his conscience dictates.

There is one further argument of the Dean which deserves notice. We give it in his own words:—

It is to be noted also that these extraordinary anomalies result from a reading of the proviso in a sense which really defeats its alleged meaning, for if the defendant be now entitled by virtue of the proviso to repel the promoters, although they are not at the present time open and notorious evil livers within the meaning of the rubric, it operates to enable him to do what he could not have done before the passing of the Act, namely, to repel persons who are not open and notorious evil livers.

The expression "it enables him to do what he could not have done before the passing of the Act" strikes us as calculated to mislead. The clergyman is not, properly speaking, enabled to do anything which he could not have done before, his right being merely reserved to do what he could have done before, namely, repel persons in the position of the promoters. However, this is more a matter of words than of substance, and it is the argument itself in which we are interested. How, we ask, does the fact that the defendant's

construction would operate to enable him to do what he could not have done before the Act, weaken the argument in favour of such construction? The effect of such construction is to read the Act as saying in substance, that persons who before were ineligible for the Holy Communion, on the ground of their being open and notorious evil livers, are no longer to be so classed, and are consequently to become eligible; whilst, notwithstanding the change wrought in the position of such parties and their consequent qualification for reception of the Holy Communion, no clergyman shall be compellable to administer it to them. There seems no inconsistency in this, nor can we discover how this interpretation of the proviso "defeats its alleged meaning." What is also apparently lost sight of is, that the same argument might be employed with equal force against the construction which the Dean himself places upon the proviso, because if the clergyman is, as the judgment holds, entitled to refuse to perform the marriage, he is enabled in the same sense "to do what he could not have done before the passing of the Act," *i.e.*, to refuse to marry a couple, there being, in law, no just cause or impediment why they should not be joined together in Holy Matrimony. The conclusion at which we arrive is, that the second point taken by the defendant was a good answer to the suit, inasmuch as he brought himself clearly within the words and meaning of the first proviso; that to restrict the meaning of the proviso in the manner of the judgment is to give it a non-natural interpretation, and that the reasoning of the Dean does not support the decision which, it is reassuring to know, has not been arrived at "without some doubt and hesitation."

G. A. RING.

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## VII.—CURRENT NOTES ON INTERNATIONAL LAW.

### **The International Law Association at Buda-Pesth.**

**A**FTER the experiment of holding three conferences in succession instead of in alternate years, it would have been far from surprising if the Twenty-fifth Conference of the International Law Association had exhibited any falling off in interest and attendance. The contrary has proved to be the case; the meeting held last September at Buda-Pesth attracted not only an exceptionally good attendance of members, but evoked a brilliant series of papers, among which those contributed by Hungarian authors were not the least valuable and important.

His Excellency Dr. Günther (Minister of Justice), who consented to fill the post of Hon. President, was unfortunately prevented from attending the opening session, on account of his official duties. On his behalf an address of welcome was read by Dr. G. Töry, of the Ministry of Justice, in which stress was laid on the great influence of the practical necessities of everyday commercial life on the development of the Law of Nations.

In replying to these graceful acknowledgments of the practical character of the work of the Association, Sir W. Phillimore (President of the Association and Conference) took occasion to observe that the conference was observing its silver wedding—its twenty-fifth meeting. He briefly reviewed its history, disclaiming for the Association any specially English foundation, and rendering a tribute to the services long ago rendered to it by a German, the late Dr. Wendt. He reminded the assembly of the work already done in the spheres of General Average, of Bills of Exchange Law and of Arbitration,—in which last-named and most important department he referred with legitimate pride to the efforts of, amongst others, Sir T. Barclay, Dr. Darby, and Dr. Trueblood.

Prof. Nagy (University of Buda-Pesth), an old and valued member of the Association, then delivered an address which will be found *in extenso* at page 1 of this issue.

Lord Justice Kennedy (who, unfortunately, was detained in England and could not read his paper personally) contributed an elaborate review of the law of blockade, which, together with the paper which he read two years ago at Berlin, on "Exemption of Private Property at Sea from Belligerent Capture" and his essay on the "Law of Contraband" read at Portland last year, goes far to furnish a complete exposition of recent ideas as to the special liabilities of neutral shipowners and merchants in war-time. The learned Lord Justice's services to the Association are many and great; and it was with universal pleasure that the conference found itself in a position to discharge some part of their debt by electing him, before it separated, President of the Association, in succession to Sir W. Phillimore. The latter now retires after a busy term of office, during which he has presided over the organization of four conferences, in Norway, Germany, America and Hungary.

Dr. Evans Darby presented his usual valuable summary of the year's work in the field of arbitration, under the title of "The Machinery of International Peace." Law, he insisted, is the condition of peace; and on this ground he rightly proclaimed the International Law Association to be a most prominent and useful Peace Society. Equally rightly, he condemned those who would force the heterogeneous States of Europe into a premature union on the model of the homogeneous and wholly provincial "States" of North America. A Hungarian professor, Mr. C. Zipernowsky, well known for his services to the cause of arbitration, also addressed the conference; whilst another, Mr. Ferenczy, recommended to its approval the conduct of the Hungarian Education Minister in instituting a "Peace Day." Sir T. Barclay and Mr. J. A. Barratt warmly

supported the recommendation, the former declaring that such an institution ensured that "on one day of the year the children would be found doing something useful."

Closely connected with this subject is that of International Courts of Prize (which are really arbitration tribunals, established for a particular purpose, and ostensibly adjudicating between State and claimant, and not between State and State). In an interesting paper, Sir Thos. Barclay forcibly urged that the self-congratulation of the British delegates on having assisted in forming a new and "really International Court" was premature, as long as there is no immediate likelihood of that Court having any law to apply; and he added that there was little advantage in substituting neutral bias for belligerent bias. He was clearly impressed by the clumsy and artificial nature of the International Court of Prize proposed at the Hague, and he seemed to conclude that no need exists to set up any rival to the existing Hague Tribunal. In any event, the conclusion reached was emphatically that it was not Great Britain's place to ratify the proposed Convention.

The topic of Extradition was introduced in an able paper by Mr. J. Arthur Barratt (English and U. S. A. Supreme Court Bars), who was able to throw considerable light on the subject from the practice of the North American States and the opinions of publicists such as Whitelaw Reid. He dealt mainly with the difficult question of the borderland between political and other offences, declaring against the treatment of anarchism as political.

Four eminent Buda-Pesth lawyers treated various special aspects of the question. Judge Berinkeý was impressed by the standing difficulty which arises by reason of the fact that nations do not penalise exactly the same things. Though statesmen are apt to entertain a loose impression that it is enough to make "stealing" or "swindling" extraditable, it is by no means easy to say that a given act would come under



the same denomination in both contracting countries. The learned Judge's suggested remedy is to discard attempts to find a common denominator in each case, and simply to let each country agree to extradite persons who have committed certain acts which are well-defined crimes according to the law of the other, without making it necessary to see precisely what crime these acts would constitute according to its own definitions. Dr. Berger and Dr. Lengyel dealt with more subtle points, such as the effect of prescription in one country, or the non-appearance of a private prosecutor where that is a *sine qua non* by the law of one country, upon extradition by another; while Prof. R. Vambéry urged the necessity of some common agreement as to the principles on which States should limit their penal activities. Eventually the subject was, after some discussion, referred to the Executive Council for examination by a committee.

The conference then took up what is in many respects the most practically important work on which it was engaged. It is thirty years since, under the impulse of that vigorous and able propagandist, Dr. Borchardt, and its equally energetic secretary, the late Mr. H. D. Jencken, it arrived at the simple propositions of law in matters of bills of exchange, which are known as the "Bremen Rules," though as a matter of fact they were considered and added to at Antwerp, Frankfort and London. Unfortunately, that work was of little immediate avail, as both the gentlemen who took such an interest in it died within a few months of each other. After this lapse of time the subject has once more come into prominence. Dr. Marais (Paris) exhibited the contradictions and inconsistencies which arise from the fact that the present French law does not recognise an indorsement in blank, whilst apparently admitting that the *bonâ fide* transferee can, using his quality of mandatary, indorse to himself or to a subsequent holder. Mr. Barnard Byles offered an exhaustive exposition of the

state of law and opinion in England on the subject, which will prove of permanent value, as little or nothing has been published on the topic in this country for many years. He expressed the strong opinion that English traders would be inclined to accept a change in their present law only in the comparatively small matters of (1) the abolition of days of grace; (2) the doctrine of "reasonable" time; (3) the introduction of the system of guaranteeing payment by "aval." In the matters of prescription, of the giving of security by the drawer in case of non-acceptance, and of reference to oath, he could see no prospect of radical changes being adopted. Dr. Sichermann (Kassa), commented in a lucid and instructive manner on the clauses of the "Bremen Rules" *seriatim*; holding that they very fairly combined the advantages of German theoretic principle and British common-sense in practical details.

The principal modifications which he suggested were (1) the maintenance of the negotiability of an overdue bill; (2) the admission, under certain conditions, of the right to cancel a written acceptance; (3) the making date and place unnecessary to be expressed. A sub-committee was appointed to consider all these papers, and to report *sur le champ*. To their report we shall refer in the sequel. It virtually adopted all Dr. Sichermann's suggestions.

On the subject of the Sale of Goods, Professor Jitta, whose volumes on the International Law of Obligations have attracted so much attention recently, contributed a short paper. Dr. Jitta called attention to the desirability of concentrating effort upon the comparison of the substantive obligations which arise in different legal systems upon the conclusion of a sale—leaving out of account, in the meanwhile, all questions regarding the formation of the contract, on the one hand, and of its operation as a conveyance on the other. Professor Neuman (Buda-Pesth) presented a most exhaustive paper, dealing mainly with the speculative

sale of goods. With the caution of long experience, he was impressed by the divergencies of rule which underlie the superficial similarity of various municipal laws of sale. Dr. Laszlö, on the other hand, was more struck by the points of similarity, and preached a vigorous campaign of unification, which Professor Neuman was inclined to regard as premature. The conference was incompetent *tantas componere lites*, and passed a non-committal resolution.

Foreign Judgments, and their executory character, have been a little neglected by the Association since a draft code was adopted in 1901 at Glasgow. Papers, such as that of Mr. Fliflet of Christiania, have been heard with interest, but no practical steps have been taken towards a settlement of the questions involved. Dr. I. Hévesi (Buda-Pesth) now laid before the conference a paper recommending that the Italian Government should be approached with a view to securing by international agreement the universal adoption of the Glasgow principles, modified so as to extend to compromises and effective arbitral decrees, and so as to admit of summary execution in the case of a judgment on a negotiable instrument; and lastly, so as to take away from the foreign Court any discretion to enforce irregular judgments, or to examine whether or not they had been obtained by "fraud." In the course of his work he gave a valuable summary of the manner in which foreign decrees are regarded in different countries. It appears that Portugal is particularly liberal, not requiring any reciprocity on the part of the foreign country where the judgment has been obtained. It is usual in England to regard as unique our rule that foreign judgments are not executory but may form the ground of an action; but it seems also to prevail in Scandinavia and in Luxemburg; while in Holland, although judgments are of no avail, arbitral decrees can be sued on as simple contracts.

Mr. Todd's paper on Comparative Procedure dealt with

the three topics of the *Conseil de famille*; Administration of goods; the effect to be attributed to Entries in Business Books; Summary Judgment, and Foreign Judgments. The author was of opinion that this country might well adopt the *Conseil de famille*, the process of summary judgment on bills, and the positive requirement that traders should keep proper business books, so that we need no longer fear "the reproach that debts are more difficult to recover [here] than in almost any of the chief Continental nations." On the other hand, the English executor was held up, along with his colleague the administrator, as a model worthy of imitation by foreign countries. Regarding Foreign Judgments, he adduced the valid and rather novel consideration that our system of taking evidence is so different from that which obtains on the Continent, that the results of the two processes (the judgments) are hardly *in pari materia*. The matters raised by Dr. Hévesi's paper and Mr. Todd's were referred to the existing committee on foreign judgments.

On the "Authentication of Foreign Law in Court Procedure," Dr. Doroghi (Buda-Pesth) read an excellent paper, recommending that each country should have a special department charged with the duty of explaining its law to foreign Courts. The conference agreed that some adequate organisation for the purpose was desirable.

Very complete accounts of the legal position of shipmasters and seamen were furnished by Judge L. Benyovitz (Fiume and Buda-Pesth) and Dr. Govare (Paris), the latter dealing with the law of France exclusively. Both will be found of great value by the commercial community as *repertoires* of information of a kind not easily collected.

Professor Baumgarten (Buda-Pesth) and Dr. G. Páp (*ibid.*) read papers which threw great light on the yet untilled fields which are opened up to juristic science by the legislation of recent years securing compensation to workmen. Quasi-contractual obligations are precisely those which the science

of Private International Law is least able to solve. The rapid spread of such liabilities makes it imperative that the question should be grappled with. A general feeling was expressed that no narrow feelings of chauvinism ought to debar a workman from relief on account of his nationality.

On the subject of the Law of Marriage and Divorce, Mr. J. Arthur Barratt, as convener of the committee appointed at Berlin, had circulated a *questionnaire* to which several replies had been received; but, pending the arrival of others, it was thought better to postpone the consideration of the matter. Papers were read on behalf of Professor Gabba (on Divorce *in fraudem legis*), and by Mr. Charteris (Glasgow), who contributed a useful exposition of the recent "Marriage with Foreigners Act." He showed that, so far, the Act was inoperative, owing to the non-conclusion of the necessary conventions; and he also offered some observations on the inadequate phrase "subject to" the marriage law of a foreign country.

On "The Strike Clause in relation to Demurrage"—a subject which has a real and pressing interest for the mercantile community, a Parisian lawyer—Dr. Georges Barbey—read a paper. *Lex non cogit ad impossibilia*: but jurisprudence at first refused to regard the practical impossibility of dealing with cargo, which arises from a strike, as releasing the charterer from his bargain with the shipowner. Thus in France a strike does not constitute *force majeure*. But more recently local Courts, led by local sympathies, began to consider it *force majeure* when it was sudden and serious. This doctrine entirely robbed the shipowner of all protection, even when the charterer may have been morally responsible for the strike. And decisions of the Court of Cassation, on the other hand, went far to deprive charterers of the protection they tried to secure by clauses in charter-parties: for it restricted the operation of such clauses to the cases of serious strikes,

constituting *force majeure*:—i.e., to exactly the cases where they were not wanted. The system, therefore, throws the whole damage blindly to right or left—on the owner or on the charterer. Messrs. Jantzen and Myhre have elaborated a fresh system, distributing the loss more equally. They give the ship an unqualified liberty to rescind her charter on hearing of a strike (even at a port of future call). She can, if partly loaded, discharge: or she can go on as a general ship—(Cf. "ice clause," *Scanfin model charter*.):—or she can, if discharging, complete the process at a neighbouring port indicated by the charterer. (Cf. sect. 10, *Danube Charter*, 1890.) Dr. Barbey approved a settlement on these lines, with some reasonable limitation designed to prevent a ship from throwing up its contract on the rumour of a strike at a distant port. Examining the statistics, he thought that a ten days' limit of distance would suffice. Dr. Barbey also would preserve to the charterers an option of preventing rescission by paying demurrage, or sending the ship at their own expense to a fresh port.

Double taxation, a subject which Dr. Wittmann (Buda-Pesth) introduced at Portland last year, he was again invited to deal with. His paper showed clearly the anomalies of the present want of system. An appendix gave the departmental rules which are designed to prevent a double incidence of duties as between Hungary and Austria. Mr. Stuart Robertson also read a paper, in which he contrived to invest with freshness "The Claims of Competing Fiscs to Lapsed Personality."

The Secretary of the Naval Department at Fiume (Dr. Darday) contributed a very subtle criticism of the rules arrived at by the Institute of International Law for the demarcation of territorial waters. Mathematically applied, in the intricate waters of the Adriatic, they give uncertain results. On the same subject, Mr. Whitelock (Baltimore) read a paper reviewing recent decisions of the U. S. Courts on

the powers of State legislatures to enact laws binding on their vessels on the high seas, particularly in the matter of altering the Common law so as to provide compensation on the lines of Lord Campbell's Act. These topics the Executive Council of the Association was requested by the conference to take into consideration, with a view to eventual action.

Professor Sanderson (Cairo) exhibited in a clear light the results of the recent jurisprudence in the Egyptian Mixed Courts in cases affecting the liability of foreign companies to be wound up in Egypt. Mr. Dessen (London) had intended to urge upon the conference the desirability of an endeavour to secure uniformity in the regulations affecting road traffic, which vary in a quite arbitrary and dangerous way. As, however, he was not able to be present, the conference was unable to take any definite steps. The matter, however, remains ripe for attention and should not be lost sight of, considering the international character which road traffic is rapidly assuming.

The Committee of the Conference on Bills of Exchange consisted of the President, Prof. Riesser (Germany), Dr. Barbey (France), Dr. Sichermann (Hungary), Prince Cassano (Italy), and Mr. W. J. Barnard Byles (England). It was with no less surprise than satisfaction that the conference learnt that an absolutely unanimous agreement had been reached. This is more than can be said for the "Bremen Rules," which formed the basis of the committee's work. In framing these, several points of prime importance were decided by a small majority. An accidental majority at a congress may be neglected: a unanimous compromise entered into by jurists of such experience as those we have named must always command respectful attention. When submitted to the full assembly, the proposed Rules had the benefit of a careful scrutiny by such authorities as Sir Thomas Barclay, Sir

H. H. Shepherd (formerly Legal Adviser to the India Office), Dr. Barna, Mr. Leader and others. Only a single division was taken, on a minor point of detail, and the Rules, with such alterations as the discussion showed to be desirable, were unanimously accepted. The Budapest Conference thus accomplished a really signal contribution towards a practical solution of this difficult question. The principal variations from English law which it recommends (by way of compromise or as substantial improvements) are, stated shortly :—

1. A bill must state its quality of Bill of Exchange on its face.
2. An overdue bill may be indorsed without the character of the indorsement being affected.
3. Cancellation of acceptance is inoperative after notice of acceptance has been given, or the bill parted with.
4. Days of grace are abolished.
5. An act of bankruptcy by the acceptor gives an immediate right of action by holder against drawer and all indorsers.
6. Protest is necessary to preserve the right to recover on a dishonoured bill.<sup>1</sup>
7. Failure to give notice of dishonour does not discharge: it gives a right to damages only.
8. The holder of a lost bill is entitled to a duplicate on giving security.
9. The "*donneur d'aval*" is recognised, as distinct from an indorser.
10. Period of limitation is restricted to eighteen months.

<sup>1</sup> But as the protest is to be "in accordance with the law of the country," and the country may have no law requiring protest (as in England, where inland bills are concerned), the utility of this provision is not apparent. It resembles the decision of the Hague Conference that belligerent warships may not use neutral waters, except so far as the neutral law permits them to do so.



The proceedings of the conference were closed at a formal sitting, held in the Great Hall of the Academy of Sciences, at which it was happily possible for the Minister of Justice to preside, and at which Sir W. Phillimore had an opportunity of expressing the thanks of the Conference for its gratifying reception in Hungary.

On the purely social side, the conference had a week of continuous entertainment, winding up with the gracious compliment of a Reception at the Palace, at which his Apostolic Majesty was represented by the Archduke Joseph (to whom the official members of the conference had the honour of presentation). The official hosts of the Association were the Buda-Pesth Bar Association, the Association of Hungarian Jurists, and the Buda-Pesth Lawyers' Club—and these bodies entertained the conference at a banquet on the evening of the 22nd, and at a river excursion on the Danube, on the 25th. The City of Buda-Pesth gave a dinner on the 24th at the magnificent Park Club, in honour of the visitors, and they were invited to a "command" performance at the Opera, the Hungarian Court being present. A reception at the Hall of the Society of Arts by the Reception Committee, must not be forgotten; nor a very enjoyable visit which was paid to the celebrated springs, where the Hunyadi János water is produced, when the members were the guests of the proprietors, Madame Saxlehener and her sons. Visits were also paid to the State Reformatories where penal surroundings are entirely and with good effects discarded. A committee of ladies was unremitting in attentions to the ladies who accompanied the members: under its auspices, an enjoyable visit was paid to the Athletic Club at the Margaretha-insel, where tea was served and photographs taken. In short, pleasure was so mingled with business as to produce an *ensemble* which was a little bewildering, but wholly delightful.

A special number of the legal magazine "*Jogallam*" (in English) was printed in honour of the conference.

The organization of the conference arrangements was effected in the most perfect manner by the local Reception Committee, of which the Presidents (under the Minister of Justice) were :—Dr. Töry, Prof. F. Nagy, and Dr. Ignaz Brüll, C.M.G. (British Consul in Buda-Pesth),—and the Secretaries, Judge Szladitz, Dr. Baumgarten, Dr. Berger, Dr. Král, Dr. E. Wittmann, and Dr. Ruzstem Vambéry. The Hungarian Government showed its interest in the conference in many ways, and indeed, without the cordial support which it was good enough to extend, the proceedings, would have been deprived of much of their *éclat* and success. Sir W. G. F. Phillimore, who now vacates the office of President, contributed in an eminent degree by his tactful and wise conduct of the proceedings to the excellent results achieved.

### **The Balkan Crisis.**

The events of the last few weeks have been so correctly appreciated by the West European press, that it seems hardly necessary to say much about them. The cry that International law is of no avail against a strong and determined Power is easily seen to be very superficial. For, at a juncture which imperatively called for action of some kind, Austria dared take no more startling step than lay in mere words. If she likes to call Bosnia and Herzegovina her own, she is perfectly at liberty to do so; there is no such thing in the Law of Nations as slander of title; and we know that George III was King of France. Bulgaria may call herself independent as much as she pleases. The point to notice is that not an inch of territory has been touched by either aspirant. Territory is the vital essence of the present system. It is at once a demonstration of that fact, and an exhibition of the force of the law which safeguards territory, that Austria and Bulgaria have so narrowly limited their action.

### The London Naval Congress.

It is hardly likely that the Congress which is expected to meet in the winter (after one or two postponements) will arrive at any definite results. The Hague Conference was undoubtedly too unwieldy to afford much hope of discussion being fruitful in this direction. It is certain that the new Congress is too exclusive. A few important States cannot hope to make laws for the world. What would Brazil say to its edicts?—or Spain?—or Norway? In point of fact, the time is not ripe for a concordat. The eager *empressement* with which the British Government is endeavouring to rush the matter is easily explained by the fact that without such a promulgation of law the so-called International Court of Prize will infallibly be a nullity. That Court has been claimed as the great achievement of Great Britain at the Hague Conference. It will never work; and the only hope of making it work is to provide it with a cut-and-dried code of law.

For such a code the world is not ready. It must be the work of generations of publicists, statesmen and jurists, slowly striking out principles which will command, by their reasonable character, universal assent and acceptance. A frontal attack on the position cannot be of the slightest service. Such an attack on the decaying and troublesome principle of contraband failed at the Hague. Its abruptness actually chilled the gathering sentiment of approval with which the first declaration of the British Government against contraband was received. And the present frontal attack on the problem of variance in the interpretation of Maritime law seems destined to the same fate.

TH. BATY.

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## VIII.—NOTES ON RECENT CASES (ENGLISH).

COUNSELS' fees, as a supplement of the law, are of interest from an antiquarian point of view, and there is no ground to assume that in their material form they are looked upon with indifference by the persons who have earned them. *Sadd v. Giffen* (L. R. [1908], 2. K. B. 510), though dealing only with the latter aspect, is to both branches of the profession a decision of some concern. In the taxation of a solicitor's bill of costs the practice of the masters has not been uniform. Some have not, perhaps, always insisted on proof that fees charged in the bill have been paid. Others, as in the present case, while requiring proof of payment, have been in the habit of adjourning the taxation, in order that the solicitor might relieve his mind of the burden of a duty unfulfilled. With this form of practice experience has enabled a good many members of the Bar to become acquainted. Now, however, it has been definitely ruled that "for purposes of taxation under the Solicitors' Act, disbursements mean actual payments before the delivery of the bill," and a claim for counsel's fees not so paid will be disallowed. This, perhaps, is not of much advantage to the Bar. Farwell, L.J., added, "in the present case a solicitor has actually attempted to obtain payment of a bill containing large disbursements which he had never made." A tone of astonishment seems almost audible in the sentence. But then it is some years since the eminent Lord Justice was at the junior Bar.

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Criticism and experience both have exhibited defects in the Criminal Appeal Act, and everybody, except prisoners who may benefit by apertures in the statute, will share the regret of the Lord Chief Justice in *Rex v. Dyson* (L. R. [1908], 2 K. B. 454), that the Legislature did not empower the Court to order a new trial in certain cases. It is

lamentable that a prisoner of surpassing brutality, who had savagely battered an infant, and more than twelve months later had again assaulted the helpless victim—who died three months after—should go unpunished. And it is lamentable also that the culprit's escape should, after medical evidence that the death of the child would necessarily have ensued from the effects of the first assault, have been owing to the learned judge at the trial having overlooked the rule of law that a conviction for manslaughter cannot be good if the deceased has survived more than a year and a day. As the jury were directed to find the prisoner guilty, if they were satisfied either that death was caused by the first assault or was accelerated by the second, the conviction necessarily had to be quashed. When the time comes to amend the Act, it is to be hoped that this imperfection in it, which was suggested at the time the Act was under its initial criticism, will be rectified.

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*Rex v. Tate* (L. R. [1908], 2 K. B. 680), is another case in which a conviction has been quashed, but here the ground was principally want of corroborative evidence, though the appeal came up on alleged misdirection. There is no inflexible rule that a jury should be cautioned when there is no evidence against a prisoner except that of an accomplice, yet the old established practice of giving such a caution "deserves all the reverence of the law." Here the reverence was not observed, but the Court expressly stated that they would not on this ground by itself have upset the conviction.

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A further case under the same Act is *The King v. Elliott* (L. R. [1908], 2 K. B. 452), in which the appeal of the convict was dismissed, and the case is interesting only from an incident. At the trial an order was made for restitution of bank notes and some ingots of gold held by the police

as products of burglary of which the prisoner was found guilty. But a dealer applied to the Court under sect. 6, sub-sect. 2, to annul the order, on the ground that, even if the ingots represented any of the stolen property, the bank notes could not, as they were the identical ones which he had paid to the thief on purchase of the property. Of course, it does seem remarkable, without knowing the whole evidence at the trial, that the person who had recovered the property which had been stolen should have also a claim on the notes which had never been his. But an examination of the terms of the section will show the correctness of the decision, that such an application can only be heard when the Court itself proposes to vary the order. And in this case it did not propose to do so. So the man whose goods were stolen finds himself in the unusual position of being richer for the raid in his house.

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Fletcher Moulton, L.J., not seldom differs from his colleagues in the Appeal Court, and always there is great discrimination in his divergence, but in *Hyams v. Stuart King (a firm)* (L. R. [1908], 2 K. B. 696) the opinion of the majority of the Court is the better one. His interpretation of sect. 18 of the Gaming Act 1845 seems somewhat strained. At any rate, though the Legislature has discountenanced betting by enacting that money lost or stakes deposited upon a wager cannot be claimed at law, yet it has never declared betting to be illegal, and the Courts have over and over again held that out of the void transaction conditions may arise which create a new contract with a fresh condition which the law will enforce. To a certain extent, perhaps, this may be thought to encourage betting, as when time is asked for by a defaulter, the winner may—a consent to postpone settlement being no consideration alone—accede on condition that the loser will base the request on forbearance to post him.

*Marreco v. Richardson* (L. R. [1908], 2 K. B. 584) is a very close application of the Statute of Limitations. A cheque in part payment of a debt was drawn with a request to hold it over for a period of about a month after the date, and at the termination of the period it was presented and met. Six years all but two days after the date of payment a writ was issued for the balance of the debt, and the statute was pleaded as a defence, and pleaded successfully. At the first moment it might seem that the defence should not prevail, for the cheque was drawn probably as a sort of security to satisfy the creditor, and it was held in abeyance solely for the convenience of the debtor. If the date of payment was the date when the cheque was cashed, the creditor could of course have recovered the balance of the debt. But the correctness of the decision that the date of payment was the date when the cheque was handed to the creditor is at once evident, if it is assumed that the debtor had, instead of a cheque, drawn in favor of the creditor as payee a bill at a future date upon a third person, who accepted. The acceptor might be quite ignorant of the transactions between the drawer and the payee, and he would meet the bill entirely for his own credit. As between the payee and the drawer, the date of payment would be that on which the bill was handed to the former, for the date when the bill was met by a third person could not be available in defining the date of the debtor's last acknowledgment of his obligation.

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The dog is the friend of man, and as such is generally privileged, if his previous life has been beyond reproach, to go cross to serve his private ends and bite his friend once. The dog in *Baker v. Snell* (L. R. [1908], 2 K. B. 352) had exhausted his privilege, and the case was well decided. But there is a good deal of uncertainty about the liabilities of the owner of a dangerous animal. Bramwell, B., in the text-

book case of *Nicholls v. Marsland*, was of opinion that the owner would be liable for the consequences, even if the animal escaped by the breaking of its chain through such an agent as lightning. Channell, J., dissents from this view, and is of opinion that when a dog of known vice is entrusted to a special keeper who to gratify some grudge of his own lets him loose, the master would not be liable to anyone who was bitten. It may respectfully be doubted whether this view would be upheld. The law seems to be better stated by Sutton, J., viz., that the owner would be liable for injury done under all circumstances, except where attack had been provoked by the plaintiff himself.

The adumbrations that surround well-based estimates of the cost of housekeeping, when adolescent fancy prompts to such pleasing calculations, are gradually condensing. *Dewhurst v. Mather* (L. R. [1908], 2 K. B. 754) decides that a charwoman, who at regular intervals affords domestic aid, is within the Workmen's Compensation Act. But on the other hand the Act does not enfold an assistant who is summoned at uncertain times; for in *Hill v. Begg* (L. R. [1908], 2 K. B. 802) the case of a window cleaner who frequently, but not at definite dates, was called in to give fuller access to the sunshine, the Master of the Rolls was "not prepared to extend the burdens of the Act to householders who simply call in a man not part of their regular establishment to do particular jobs as and when the necessity arises." And it may be some relief to the householder, present or prospective, to feel that *Fitzgerald v. Clarke & Son* (L. R. [1908], 2 K. B. 796), following the earlier case of *Armitage v. Lancashire and Yorkshire Railway Co.*, holds he is not to suffer in income for mischief clearly and wholly caused to one of his servants by the practical joke of another in his employ.

T. J. B.



## SCOTCH CASES.

Two judgments under the Merchandise Marks Act 1886 may be noted together. *H.M. Advocate v. Jacob* (45 S. L. R. 852), was tried as a *quasi*-criminal case before the High Court of Justiciary, on an allegation that in answer to a written request for patterns of "Scotch tweeds all wool," in order that the writer might choose material for a suit, the clothier had furnished patterns some of which did not answer the description. There were no markings on the patterns except the price. A suit having been made to order from a pattern which was not "all wool," the complainer sent the price before delivery in terms of the contract, but asked the respondent to send a receipt for the money in a form supplied by him which emphasised the false description. An ordinary invoice and receipt was sent with the goods bearing only "Suit to order." It was held not proved that the trade description, "Scotch tweed all wool" had been applied to the suit, and the accused was assoilized. The other judgment was pronounced by the Second Division of the Court of Session as in a civil action (*H. M. Advocate v. Suits Limited*, 45 S. L. R. 886). Here, upon facts almost identical, the Court held that the clothiers had acted "innocently" within the meaning of sect. 2, sub-sect. 2 (c) of the Act, and the accused were, as in *Jacob's Case*, assoilized. In both cases the fact that the letter sent was admittedly a "trap order," gave rise to observations from the Bench which deserve attention. In the words of Lord Low, "It may be necessary, if the statute is to be enforced, for a procurator-fiscal to employ a person to make a fictitious purchase, but everything ought to be done in a straightforward manner, and the article ought to be asked for unambiguously. Here the whole correspondence seems to have been calculated, if it was not designed, to mislead. The letters were from beginning to end an unfair attempt

to entrap the tradesmen to whom they were addressed." Other judges made remarks to the same effect.

Two cases of slander having somewhat common characteristics were decided during the quarter. Both involved the question whether a master is responsible for slander uttered by his servant, but in the one case the alleged slander was written, while in the other it was verbal. In *Beaton v. Glasgow Corporation* (45 S. L. R. 780), a swimming instructor sued the Corporation of Glasgow for damages in respect of a written report, made by a superintendent of baths to the city's general manager of baths, and forwarded by the latter to the clerk of the School Board of the city. It was alleged that the statements contained in the report were false and slanderous, and were intended to bring about the dismissal of the pursuer from the service of the Board. The First Division held, that even assuming the report was untrue and slanderous, the action could not be maintained against the Corporation. The position of general manager of baths did not imply authority from the Corporation to make communications on their behalf as to the business of the baths, especially to an outside body like the School Board, and there was no special averment that to make such reports was within the scope of the manager's employment.

The other case was *Finburgh v. Moss' Empires Limited* (45 S. L. R. 792), in which the Second Division held an action relevant to go to proof on an averment that the under-manager of a theatre had entered a box, in which the pursuer and her husband were sitting, and pointing to the woman had said, "That woman is a bad character, and must leave this theatre." It was further averred that the general manager was called, and that after hearing statements by the under-manager and by an attendant, he had said, "That is quite enough, the woman must leave

at once." The defenders pleaded that under a bye-law of the City of Glasgow the manager of a theatre was prohibited, under a penalty, from knowingly permitting any woman of bad fame to enter the theatre, and that the manager, under-manager and servants, had acted throughout in the *bonâ fide* exercise of their duty. Further, that if slanderous expressions were used by the servants of the theatre it was without the scope of their employment, and that in any event they were privileged. It was held that the defenders' servants, in uttering the statements complained of, were acting within the scope of their employment, so as to render the defenders liable in the event of damage being sustained. In the course of the argument, and in the opinions of the judges, many cases (both English and Scottish) were cited and commented on, as to the effect of written or verbal slander by a servant, for which a master may be held responsible.

Scotland has taken at least its full share in defining "charity" and "charitable" as applied to a testamentary settlement. In *Blair v. Duncan* ([1901], 4 F. (H. L.) 1), a direction to apply the residue of an estate "for such charitable or public purposes" as the trustee might think proper, was declared invalid on the ground of vagueness and uncertainty. In *Grimond v. Macintyre* ([1905], 7 F. (H. L.) 90), the House of Lords, reversing the Second Division, held void from uncertainty a direction to divide part of an estate to and among *such charitable or religious institutions and societies* as the trustees might select. Again, in *McCaig v. University of Glasgow* ([1907], S. C. 231), it was held that a trust to expend £3,000 a year in the erection and maintenance of statues of the testator and his brothers and sisters was ineffectual in law, although incidentally it provided for the encouragement of young and rising sculptors and artists by the institution of prizes for

designs. (See *ante*, Vol. XXXII, pp. 225, 356). The argument that the encouragement of rising artists made the trust a charitable one for the promotion of art was easily set aside.

On the other hand, in *Weir v. Crum Brown* ([1907], S. C. 185); Affd. ([1908], S. C. (H. L.) 3), a trust for "*the relief of indigent bachelors and widowers who have shown practical sympathy in the pursuits of science*" was sustained as a form of relief of indigence not too vague or uncertain for practical application. In *Allan's Executor v. Allan* ([1908], S. C. 807), a trust for "*foreign missions*" selected by the executor, was sustained, and in *Dick's Trustees v. Dick* ([1907], S. C. 953); Affd. H. L. ([1908], 45 S. L. R. 683), a bequest of residue to be divided by trustees among "*such local or Scottish charitable institutions*" as they might select, was held good. We have now another case tending to further elucidation. In *Hay's Trustees v. Baillie* ([1908], 45 S. L. R. 908), a trust was sustained for the division of the residue of an estate among such "*societies or institutions of a benevolent or charitable nature*" as the trustees might think proper. In the last-mentioned case the Lord Ordinary (Johnston) set the bequest aside on the ground of uncertainty, but the First Division reversed and sustained it in a well-reasoned judgment.

It was pointed out by Lord Dundas, in *Hay's Trustees v. Baillie* (*cit. sup.*), that English cases on the subject of charitable bequests were founded on a principle not applicable to Scotland, and could not therefore be cited with authority. It is common to both countries that every man in the disposing of his estate must express his own wishes, and must not leave another to select the favoured persons. It is true, also, that in both countries an exception has been introduced in favour of charitable objects. Here, however, the analogy ceases. It was observed by Lord Davey, in the

Scottish case of *Blair v. Duncan* ([1901], 4 F. (H. L.) 1, at p. 3), that "the English law has attached a wide and somewhat artificial meaning to the words "charity" and "charitable" derived, it is said from the enumeration of objects in the well-known Act of Elizabeth (43 Eliz., c. 4), but probably accepted by lawyers before that statute. In the law of Scotland there is no such technical meaning attached to the words." The chief ground of judgment in *Hay's Trustees v. Baillie* (*cit. sup.*), was, that the words "charitable" and "benevolent" did not in Scotland express an alternative, but were merely two words expressing in an amplified, and perhaps redundant, fashion the scope of the delegated bounty of the testatrix. Under this reasoning the case was at once differentiated from those of *Blair* and *Grimond* (*cit. sup.*), where the word "charitable" was used as an alternative to "public" and to "religious" respectively. The special interpretation of "charitable," cited by Lord Davey (*supra*), as peculiar to English law, has resulted in English decisions which are not in harmony with the law of Scotland, and which, if given effect to, would necessitate the separation of "charitable" and "benevolent" as alternatives essentially different in character. In illustration of the conflict between the laws of the two countries, Lord Dundas cited the English case of *White v. White* (L. R. [1893], 2 Ch. 41), and the Scottish case of *Grimond v. Macintyre* (*cit. sup.*), which could not stand together, although each may be presumed to be good law in the country of its origin.

R. B.

### IRISH CASES.

THE vagaries of the law as to franchise and registration are a source of delight to political agents, and of worry to revising barristers. For instance, a person who is otherwise entitled as the inhabitant occupier of a dwelling-

house has a kitchen, which is part of his qualifying premises. Upstairs, there lives another person who occupies the upper part of the house as a separate dwelling. But the stairs, which form the only access to the upper part, lead through the kitchen, and the upstairs tenant is entitled to pass over a yard or two of the kitchen floor in order to reach them. The result, according to the Court of Appeal (*M'Bride v. Bryans* [1908], 2 Ir. R. 329), is, that the downstairs man loses his vote, although the upstairs man does not. The stepping across the kitchen floor prevents the exclusive occupation of the qualifying premises, which is necessary for the household franchise.

Again, a person is entitled as a rated occupier if he is in occupation of premises rated on a valuation of £10. But this franchise was held not to have been gained by a man who was in the following position. He was rated on four separate ratings, amounting in all to £9:11s. He also owned one-fifth share in a mountain-shooting, which was rated at £4:5s. Seventeen shillings of the last-mentioned rate had, in fact, been collected from him, but the rating had never been segregated in the rate-books between him and his co-owners. It was held that he could not add the seventeen shillings to the other ratings, so as to bring himself over the £10 limit. You cannot tack an undivided share in a joint rating to a separate rating (*Buchanan v. Torish* [1908], 2 Ir. R. 321).

What used to be called a "*dum casta* clause" cannot be implied in a separation deed on the part of a husband, though it may be as to a wife. In *Ross v. Ross* ([1908], 2 Ir. R. 239), a deed of separation provided that the wife should accept certain chattels and a sum of money, and contained a covenant by the wife that she would not thereafter institute any proceedings to enforce any claim for any further alimony or for support or maintenance. Subsequently the husband committed adultery, and the wife

obtained (under the Irish practice) a divorce *a mensa et thoro*. She then applied for alimony as from the date of the divorce: but the Court held that the covenant in the deed restraining her from doing so still applied, and that the husband's adultery did not deprive him of his right under this covenant. In other words, there had been no breach of an implied condition on his part. It is to be noted, however, that the English cases as to dissolution of marriage and subsequent variation of settlements by the Court, do not apply to the Irish practice.

*Palmer v. Bateman* ([1908], 2 Ir. R. 393) is an illustration of the limits to be put upon what Sir F. Pollock calls the "duty of insuring safety," incumbent upon the owner of fixed property towards persons lawfully coming upon or near such property. The plaintiff, while passing along a street beside the defendant's house, was injured by a piece of the gutter from the roof falling upon her. The fall was due to the rotting of a screw. Evidence was given on behalf of the defendant that workmen had been periodically employed to examine and repair the gutter; there was no evidence that the defendant knew of its want of repair or its defective condition. The jury found that there was no want of reasonable care on the part of the defendant in maintaining the gutter, and that its fall was not occasioned by any neglect or default of his. It was held on a motion for a new trial that this was a verdict for the defendant, which he was entitled to retain. In other words, the cause of action is apparently negligence, although the case is one in which a very high standard of care is required, and very slight negligence will make a defendant liable. Still, negligence is a jury question, and if the jury negative its existence, and there is any reasonable evidence on which they can so find, that is an end of the matter. The duty is not an absolute duty of insurance, but a duty to employ a very high standard of care. *Tarry v. Ashton* (1 Q. B. D. 314) was held to be distinguishable.

J. S. B.

## Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

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*The Public Trustee Act 1906.* By F. G. CHAMPERNOWNE, H. JOHNSTON, and J. S. C. BRIDGE. London: Butterworth & Co. 1908.

The learned Authors have treated in a very exhaustive manner a very complicated Act of Parliament. In an admirably written and carefully thought-out Introduction they have traced (A) The trend of public opinion which led to the Act; (B) The strong points of the Act; (C) Its inherent weaknesses; (D) Its novelties. There is no doubt that for many years it has been felt that it was essential for some public official to be appointed and guaranteed by the Government, who could lighten the burden cast upon private individuals. Moreover, the numerous cases of defaulting trustees caused an immense amount of widespread misery. On the other hand, in a well-meant effort to lessen this evil, the Legislature had increased the risks of taking up the post of trustee until it became almost impossible to find an adequate supply of individuals to undertake the duties of that office. The Authors do not appear to rank very high the draughtsmanship of the Act, but year by year one notices how common has become a slipshod style of drafting public Acts of Parliament. An experiment is made in legislation; wide, vague, and often incomprehensible principles are enunciated, and it is left to amending Acts and judicial decisions to bring these principles within the limits of precision. The Workmen's Compensation Acts are instances of this, whereas old Acts, such as the Fines and Recoveries Act, come triumphant through the ordeal of practical experience. The Act may be divided into four parts for practical criticism: (1) The part which deals with the Public Trustee; (2) The part dealing with the Administration of Small Estates; (3) The part dealing with Custodian Trustees; (4) The part dealing with the Audit of Trust Accounts. The Introduction treats of each division in detail, giving the pages of the text which affect them. The notes appended to each section are a mine of useful information both practical and theoretical. The language employed throughout is simple, accurate and informing. The text of the Act is in addition



added in an Appendix without annotation ; the Rules approved by the Treasury are also set out *in extenso*. The forms given, though few in number, will prove to be of great practical utility. Among the other good points to be noticed is the Index, which is easy of comprehension and renders research simple.

*The Victorian Chancellors.* Vol. II. By J. B. ATLAY. London : Smith, Elder & Co. 1908.

We have perused with pleasure the second volume of Mr. Atlay's interesting work. As he gets nearer our own time he deals with matters more familiar to most of us ; and long and complete biographies exist full of information about Lord Campbell, Lord Westbury, and Lord St. Leonards. In all these cases Mr. Atlay has selected his materials well, and blended them into an excellent and most readable narrative. He does full justice to all the subjects of his biographies, but never shrinks from condemnation or criticism when he feels it deserved. We are not sure that in some cases, such as Lord Campbell, he does not in the end treat his Chancellor rather more favourably than is quite consistent with his earlier criticism. We are much indebted to Mr. Atlay for the accounts he has given us of Lord St. Leonards, Lord Cranworth, Lord Chelmsford, and Lord Hatherly. The information that even Mr. Atlay has been able to collect about some of these is rather scanty, but he is able to tell us much, about Lord St. Leonards in particular, that has not, we believe, been in print before. He has had the great advantage of being enabled to draw from a most valuable autobiography which Lord Chelmsford left behind him, and also in a slight degree to benefit from memoirs of Lord Cairns and Lord Hatherly. Lord Cranworth and Lord Hatherly were both very lucky in attaining the Chancellorship, Lord Cranworth in particular, whose practice had dwindled down after he took silk, and who was a very ineffective debater. Perhaps his main legislative success was in the Divorce and Matrimonial Causes Act 1857, which he forced through the House of Lords "against the vigilant and strenuous opposition of Bishop Wilberforce." As a Chancellor he was most successful. Lord Selborne wrote, "Take him for all in all he was one of the best Chancellors I have known. Others had more splendid gifts ; but in him there was nothing erratic, nothing unequal. In steady good sense, judicial patience, and impartiality and freedom from prejudice he was surpassed by none." Lord St. Leonards' is a most

remarkable career. The son of a hairdresser, he was, according to one story, put into the law because he had "no genius" for his father's profession. The publication of his first book, the *Law of Vendors and Purchasers*, at once brought him a large business. He "awoke to find himself famous and his table loaded with abstracts of title and cases for opinion:" and success seems to have been nearly as rapid when he decided to go to the Bar. His first attempts to enter Parliament were not equally successful: he failed in his efforts to represent Sussex and Shoreham, and only got in for Weymouth and Melcombe Regis after a severe and expensive contest. He was probably not an ideal candidate. We are told that "his manner was self-assured to the verge of annoyance, while a monotonous delivery and a shrill voice which sometimes rose almost to a scream, were not rendered the more acceptable by a rapidity of utterance which frequently baffled the reporters." There is an amusing account of his relations with Brougham when the latter was first Chancellor. He was twice Lord Chancellor of Ireland, once of England, and declined it a second time. He carried some useful reforms in the law and was long "regarded in his own province as an almost infallible oracle of law." He died "the Nestor of the profession." within a few weeks of completing his ninety-third year. Lord Chelmsford, after having for a short time tried the Navy, was saved by the entreaties of Mr. Godfrey Sykes, an eminent special pleader, from going to the West Indian Bar and wasting "his abilities on the planters and mariners of St. Vincent." His first successes were made at the Surrey Sessions, and it is interesting to note that he purchased for £2,000 a place at the Bar of the Palace Court, made so notorious by Jacob Omnium, and was one of the four counsel who "owe their places to their money, not their wits." His success on the Home Circuit was not rapid; it was five years before he got a brief in a civil cause. His first great case was when he defended Hunt, who was charged along with Thurtell and Probert for the murder of Weare; but the case that really made him was, according to Mr. Atlay, an ejectment case, the name of which he does not give, and which was tried no less than three times. It was tried at Chelmsford, and Thesiger, in memory of this, took his title from that town. He had a large Parliamentary practice at one time, and nearly gave up his other work, but was dissuaded by Sir George Rose, who advised him, "Don't take to the House line, stick to the Road." He was a very successful advocate,

but was perhaps less successful as a debater and a judge. Lord Selborne's rather prejudiced judgment was : "He performed his part in the Court of Chancery as well as most Common law Chancellors." We have no space to refer to Mr. Atlay's full accounts of Lord Westbury or Lord Selborne, but we should like to give a few quotations from his account of Lord Cairns, about whom less has been written. He was one of the most successful of lawyer-politicians. To his Party, badly matched with the debating power of parliamentary liberalism in the years before the Reform Bill of 1867, "this calm, unimpassioned lawyer from Ulster, with his remorseless logic, his complete command of language, and the imponderable strength of a great personality, was indeed a very present help in trouble." Mr. Atlay defends him from the criticism of Mr. Bryce, who accuses him of having been not merely a Party man, but a partisan, by saying, "But to many, and to myself among the number, it will always seem that his outlook on matters of national and imperial policy was bolder and more far-seeing than that of Mr. Bryce." It is tempting to quote more from this and other lives, but we must refrain and refer our readers to search Mr. Atlay's pages for themselves. Short and appreciative sketches of the careers of Lord Halsbury and Lord Herschell complete the cycle of Victorian Chancellors. It is gratifying to us to find frequent references to earlier numbers of this Magazine ; and an indignant protest is quoted from it of the large use made by Lord Campbell, in his *Lives of the Chancellors*, of articles from the *Law Magazine* without acknowledgment.

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*Real Property.* By A. F. TOPHAM, LL.M. London : Butterworth & Co. 1908.

This is intended as a book for students, and the Author believes that, as regards the law of the present day, it "will probably be found sufficient in itself for the purpose of the Law Special at Cambridge and other similar pass examinations." It does not, however, deal fully enough with the history of the law to be sufficient for honour students, and so far is only intended as "a first explanation," and an introduction to such a work as *Williams on Real Property*. The book strikes us as a good one for students so far as it goes. The language is always clear, the arrangement judicious, and the rules given are well and frequently illustrated. We are not sure that the Author might not with advantage have cut down even the history of the law he does give us. Portions of

the Principal Statutory Provisions relating to Real Property are given in Chapter XXXVI, and Mr. F. P. Fausset has contributed some test questions which should be useful to students.

*International Documents.* By E. A. WHITTUCK, B.C.L. London: Longmans, Green & Co. 1908.

Mr. Whittuck has made a valuable collection of what he describes as law-making treaties, which he thinks may be regarded as "the statutory part" of the law of nations. This statute-making had its great impulse at the Congress of Paris 1856, and has recently been much developed by the Hague Conferences. The treaties are set out in French and English. The English translation is mostly taken from the official English translation, though in some cases an independent version is substituted. Part I contains the Declaration of Paris 1856; the Convention of Geneva 1864; Additional Articles 1868; and the Declaration of St. Petersburg. Part II consists of the Hague Peace Conference 1899 and the Geneva Convention 1906. Part III contains the Acts of the Conference of 1907. In a most valuable Introduction Mr. Whittuck discusses shortly the different treaties, and points out how they affect or modify each other. The Acts of the Hague Conference 1907 he examines one by one, and points out what different views were expressed, and how far agreement was arrived at. On some points, such as the immunity of the private property of a belligerent at sea, and the question of contraband, the Conference could not agree on conventions. Reduction of military armaments could not be approached. The result was thirteen Conventions and one Declaration. Most of these have been since signed with or without reservations, but the Convention relative to the establishment of an International Prize Court has not yet been signed by Great Britain, who has till the 30th June, 1909, to do so. Many disappointments were caused by the result of the Conference, one of the chief being the meagre results of the discussion on automatic mines. The propositions for the establishment of a new Court of Arbitral Justice, and for compulsory arbitration in certain cases, failed to be embodied in Conventions. It is rather a pity Mr. Whittuck did not delay the issue of his work till he could give us a complete table of signatures and *réserves* up to the 30th June, 1908, instead of the incomplete table on pages 229—234. The whole forms, however, a body of International Documents of the highest value, the examination of which is much aided by Mr. Whittuck's Introduction.

*International Law applied to the Russo-Japanese War.* By SAKUYÉ TAKAHASHI, LL.D. London: Stevens & Sons. 1908.

Professor Takahashi, who is a Vice-President of the International Law Association, and an acknowledged authority on the Law of Nations, published at the close of the war with China a volume dealing with points which arose in that conflict. The more recent war with Russia is the occasion of the present work. It is divided into five parts, of which the last is devoted to a report of the many cases decided in the Japanese Prize Courts. The four previous sections are respectively concerned with the topics of Commencement of Hostilities, Land Warfare, Naval Warfare, and Neutrality. Under each main division the various ramifications of the different topics are discussed in separate chapters. The arrangement is admirable, and the facts of every case (and none, however insignificant, appears to have been overlooked) are set forth with the utmost precision and detail. Documents and State papers are quoted *verbatim*. It is for the sake of the facts thus minutely and officially reported that the volume is so exceedingly valuable. Professor Takahashi does not refrain from expressing his own views on occasion, but in the main he limits his rôle to that of a chronicler. The whole work is packed full of the most interesting and authentic information. It is perhaps a pity that it must inevitably wear the colour of an *ex parte* statement. The conduct of the Japanese was so immeasurably superior to that of the Russians that it might well have been the part of an entirely neutral observer to record it. On the questions raised by the events of which Professor Takahashi is the historian we must refrain from entering here. We have not even space to indicate many which must be new to Western lawyers. It can only be said that there is here material afforded for a library of monographs. Important matters outside the sphere of law, such as, for instance, the best lights for hospital ships to display, are also the subject of careful memoranda. We will allow ourselves the observation that the statement (p. 487) that "International law imposes an obligation upon a neutral government to prevent its subjects from selling any war materials to either party of the belligerents" is clearly open to grave exception. It would amount to requiring neutrals to stop contraband traffic, and this is certainly not their duty. Apparently the book has not been very carefully revised for press by the six gentlemen who assisted in that process. At p. 488, *The Franche-Comté* ought seemingly to follow the

succeeding two lines. On p. xii (and elsewhere), "*Old Hamia*" should be one word, and "*Tetatos*," *Tetartos*. On p. 370 the report of *Paulof v. Ward* abruptly determines, without any note of the decision, and seems to be resumed on p. 402. On p. 641, the heading "*Decision of the Higher Prize Court*" is wrong. The section relating to the armistice in N. Korea is couched in the present tense. Misprints of less importance are not infrequent. We must not close without calling attention to the tabular statements in which the exact particulars of merchant ships attacked by Russian vessels, and the damage done in each case, are recorded: also the offences committed by prisoners of war, the articles forwarded through the Prisoners' Effects Bureau, and many other valuable statistics. To the jurist, to the naval or military officer, to the anthropologist, and indeed to every serious reader, Dr. Takahashi's book of 805 closely printed pages recommends itself by its own merit.

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*The Law and Practice of Civil Proceedings by and against the Crown.* By G. S. ROBERTSON, M.A. London: Stevens & Sons. 1908.

It has been an open secret in legal circles for some considerable time past that Mr. Robertson was preparing the work under review, and much curiosity was aroused regarding the lines upon which he would carry it out. The subject has never before been treated of in its entirety, so that in reviewing this work one has no standard for comparison. In the year 1820 Chitty wrote a book on the Prerogative of the Crown, which contained two chapters only dealing with proceedings by and against the Crown. We find parts of this great subject dealt with by such writers as West, Serjeant Manning, Fowler and Clode. In the *Annual Practice* of 1908 Mr. J. Johnston gave an outline of Revenue Practice. In the present work we find a complete survey of this intricate and technical branch of law. The treatise is divided into seven books, each one of which might well have furnished sufficient matter for a text-book. Civil proceedings by and against the Crown, Members of the Royal Family, and Government Departments are dealt with in the first book. Therein in rapid survey pass the individuals composing the Royal Family, together with their several official representatives. Next appear the several Government Departments, so numerous as to occupy two and a-half pages of the list of contents. Proceedings on the Revenue side of the King's Bench Division is the subject of the

second book. Again, we find a further subdivision into three parts. Part I deals with "Crown debts and their recovery," Part II with "Proceedings at law on the Revenue side of the King's Bench Division," Part III with "Proceedings in Equity on the Revenue side of the King's Bench Division." Petition of Right is a branch of legal knowledge within the scope of nearly every lawyer, finding its place in Book III; it constitutes, perhaps, the gem of the whole book. Herein is delineated in clear, simple language, this mighty fundamental right of the subject. Free from ancient history of no practical utility, the subject is dealt with in a clear, succinct form. The learned Author gives a clear and all-embracing definition of Petition of Right, pointing out how that this definition, differing little from Blackstone's, is wider in its scope than Staundford's or Comyn's, and embraces petitions for unliquidated damages for breach of contract. It would not be possible for us, within the limits of a review, to follow to its termination the scholarly treatment of this subject. Passing on to Book IV, we have the somewhat limited question of Escheat dealt with. Again, in the fifth book, "Other Civil Proceedings in which the Crown participates," a variety of subjects in which the Crown is party, finds a place. One of the most important divisions of this treatise is the sixth book, in which "Points of practice and procedure" are noticed. Such interesting questions as the Sovereign being a witness, discovery by a foreign sovereign, are discussed in an interesting and erudite fashion. In the seventh book a very learned disquisition is given upon "Actions against Executive Officers of the Government"—a subject of very supreme importance to the practical lawyer. The book contains a plethora of forms and precedents culled from the ripe experience of Mr. Justice Sutton, and Mr. A. H. Dennis, Assistant-Solicitor to the Treasury. The book itself is dedicated to the Lord Chief Justice of England, and enjoys the assistance in preparation of such master craftsmen as Mr. Justice Joyce, Master Mellor, and Mr. Acland, K.C., as well as others who have done their share. The Table of Cases, Table of Statutes, and Table of Rules and Orders, show careful revision and compilation; the Index has been carefully drawn up, and is copious and illuminating of the text. Speaking of the book as a whole, we feel certain that it will be widely appreciated by the legal world. It displays, on the part of the learned Author, a ripe scholarship and erudition that it would be hard to rival. Dealing with a wide subject, it is certain to have a

large circle of readers. A large portion of the treatise, being exceedingly technical, will be of interest to specialists, but the rest will appeal to all lawyers. Of the intrinsic merit of the book we can speak with no uncertain note of praise, and we can only hope that its scope of success may be commensurate with its great innate merit.

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*The French Civil Code.* By E. BLACKWOOD WRIGHT, LL.D.  
London: Stevens & Sons. 1908.

In these days of the "Entente Cordiale" it is not at all unlikely that many English will like to learn something of the Code Napoléon which is the law of our Gallic neighbours. The British Empire is Cosmopolitan in its administration of law, and no doubt it will be news to many that the Code Napoléon is the law of the Colonies of Mauritius and Seychelles. Apart from this, the translation will be most useful to the ever-growing body of English lawyers practising in the Egyptian Courts where French law is so much in vogue. With many of the criticisms of the learned Author pointed at the Code we cannot profess to agree. The Code is so much based upon the Roman law modified to modern usage, a kind of law in use in many of our Colonies, that some of Mr. Blackwood Wright's criticisms appear to us to smack of insularity. He says, "The position of married women under the Code is *lamentable*," and then continues to describe it. The description shows that it is analogous to her position under the Roman Dutch law, a system which is administered in such places as British Guiana, Ceylon, and last but not least, in South Africa. It has lasted in these places for many years, as indeed it has in France; and yet Mr. Blackwood Wright condemns the whole position as lamentable; *quod homines tot sententiæ* might well be remembered by the learned Author. Other matters might be mentioned in this connection, but the above example will suffice. The notes on English cases which illustrate the text are very clear and well stated. For the use of lawyers in Mauritius and Seychelles, a black line has been placed against those sections which have been amended or altered by the Ordinances of Mauritius. We are inclined to disagree with the Author in thinking that his circle of readers will be limited, as with so much commerce between France and England, a commerce which is ever increasing, the lawyers on both sides of the Channel will find many opportunities for research in the laws of both countries. The Index is a very excellent one. Our only



criticism on this work of all-round excellence is that in any future edition the Author might, with advantage, revise some of his rather strongly-expressed and somewhat limited views in the Preface.

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*Butterworth's Ten Years' Digest, 1898 to 1907.* 4 Vols. Under the general editorship of SIDNEY W. CLARKE. London: Butterworth & Co. 1908.

This work is under the general editorship of Mr. Sidney Clarke who has been assisted by seven other gentlemen, namely, Messrs. Plumptre, Laurence, Coltman, Emanuel, Valentine Ball, Hopkins and Clover. Published in four volumes, Volume I contains subjects ranging from Actions to Friendly Societies; Volume II, Game to Post Office; Volume III, Powers to Work and Labour; Volume IV, a list of the words, terms and phrases used in the Digest, cases affirmed, reversed, etc., and the Table of Cases digested. Including the years 1898 to 1907, some 9,300 cases are dealt with, the same system of arrangement being employed as one finds in the *Encyclopædia of Forms and Precedents*, also in Lord Halsbury's *Laws of England*, with any necessary modifications. Every case is numbered, and if dealing with two or more points, appears under its several headings with numbered cross-references to the others. The main subjects have each a separate list of contents, and comprise cases decided in the English Courts during the years above mentioned, together with many decisions of the Scottish and Irish Courts. The Table of Cases affirmed, reversed, etc., is very complete, and must have necessitated a stupendous amount of detailed work. Looking through the Digest, one is much struck by the completeness with which some of the more important subjects are dealt with. For instance, Bankruptcy and Insolvency, Criminal law and Procedure, Local Government, Metropolis, Practice and Procedure, Wills, and many others too numerous to name. Speaking generally, it is safe to recommend it as a reliable and useful Digest, which will prove to be a welcome addition to any law library as a work of reference.

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**Second Edition.** *The Law of Carriers by Land.* By W. H. MACNAMARA and W. A. ROBERTSON. London: Stevens & Sons. 1908.

It is twenty years since the first edition of this work was published, and it is hardly necessary to point out how much the subject treated

on has widened since then. Important statutes, such as the Railway (Rates and Charges) Order Confirmation Acts 1891-2, and the Railway and Canal Traffic Act 1894, have been passed, and we should not like to have to say how many reported cases have been decided on the subject. The Authors have, therefore, had plenty to do in revising the former edition and making the present one a complete digest of the law, and including the cases on the subject reported, not only in the English, but in the Scottish and Irish Courts. The work has the form of a code or series of numbered articles. We hardly think that the law of Carriers has made much progress towards codification since 1888, but when it is "feasible and desirable" the Authors modestly hope "that this Digest may afford facilities for that operation." It throws, however, some light on the possibilities of codification, to find that the Authors have found it impossible to deal with the Rates and Charges Acts of 1891-2 in separate articles; but the London and North Western Railway Company's Rate and Charges Order Confirmation Act 1891 has been given as a specimen, with references to the cases which have been decided under this or the similar Acts of other companies. Questions of very great difficulty arise under some of the Railway Acts, such as the Railway and Canal Traffic Act, which can only be adequately dealt with by those who, like the present Authors, possess, not only a knowledge of the law, but also a wide experience of the practical working of railways. The portion of this volume most interesting and important to the mercantile community will probably be Parts I and II on Carriers of goods by land generally, and Carriers of goods by railway; where, among other points discussed, are those very difficult ones of "reasonable facilities," and "undue preference." Part III is a very short one on Carriers of animals by railway. Parts IV and V are important to us all, as they discuss the carriage of passengers' luggage by railway, and the carriage of passengers themselves by railway, respectively. Under the first heading it is worth while to note that the learned Authors seem to think that *Becher v. G. E. Ry. Co.* is over-ruled by *Meux v. G. E. Ry. Co.* It is also interesting to note that the common regulation of railway companies, that passengers' luggage must be addressed with name and destination of owner, has been decided not to be a just and reasonable condition within sect. 7 of the Railway and Canal Traffic Act 1854. The second heading, Carriage of passengers by railway, is more important, and takes up about

100 pages. Some points are still doubtful, Article 343 would hardly find place in a code, as it states "It is doubtful how far it is the duty of a carrier of passengers . . . . . to receive all persons as passengers . . . . ." and in the note the Authors say, "It is submitted that in England a carrier of passengers is not a common carrier according to the custom of the realm and the Common law." Another article lays it down that, though not so decided in the *Perth General Station Committee v. Ross*, "a railway company has, in the first instance, the right to exclude any person from their stations"; but both these points are of little practical importance owing to the powers of the Railway Commissioners. Part VI treats of Carriage of passengers by road. The whole forms a remarkably clear digest, well provided with notes of cases.

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**Second Edition.** *The Practice on the Crown side of the King's Bench Division.* By F. H. SHORT and F. H. MELLOR, K.C. London: Stevens & Haynes. 1908.

The first edition, founded upon Corner's *Crown Office Practice*, appeared in 1890, and immediately took its place as a text-book of high standing. Since then many Acts have been passed, necessitating the total revision and re-writing of the work. There is no doubt that both of the learned Authors are well equipped for their task, Mr. Short as being chief clerk of the Crown Office, and Mr. Mellor by reason of his wide experience in this class of practice. The Judicature Act of 1894 and the Court of Criminal Appeal Act 1907 are both Acts of Parliament which have entailed a considerable addition to the treatise. New Crown Office Rules appeared in 1906, which, taken with several important judgments, have added to the burden so well sustained by the Authors. In the present edition a novelty has been introduced by abolishing chapters, and simply taking the Rules in chronological order and annotating them. This certainly appears to us to be an improvement. Certain subjects, such as Mandamus, Certiorari, Prohibition, Attachment, etc., have been picked out for special treatment, owing to their complexity. In Appendix C are to be found the official forms in use, in Appendix D we have additional forms suggested by the Authors, but which are not official. The present edition, although not running to so many pages as the first, is printed on larger size paper. The Index is excellent, and the printing of the sub-heads in the method adopted makes for clearness and rapidity of search. In conclusion, it may

well be that the present edition, maintaining the high standard of excellence of the first, will find an equally large circle of readers.

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**Fourth Edition.** *Leading Cases in the Criminal Law.* By H. Warburton. London: Stevens & Sons. 1908.

This is a very useful collection of cases. There is hardly a branch of the Criminal law on which some information is not to be found except a few very special branches, such as Gaming, Adulteration, and Offences against the Licensing laws. The number of leading cases given is considerable, being nearly 140, and a large number of other cases are referred to in the notes, the law being in all the points we have looked out brought quite up to date. A good many important cases have been decided since the last edition in 1903, but Mr. Warburton has not considered any of them worthy of being a leading case. He has, however, added three cases, namely, *R. v. Vreones* (Offences against Public Justice); *R. v. Wealand* (Carnal Knowledge of Children); and *R. v. Penfold* (Previous Convictions). The book has been somewhat improved in statements of facts and quotations from judgments. The only exception we have noticed from the general accuracy is in the account of *R. v. Audley*, where it is stated that the Court held that in that case it was not necessary that the indictment should contain an averment that the accused was *not* a British subject, instead of that the accused was a British subject.

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**Fourth Edition.** *Robbins and Maw's Devolution of Real Estate and Administration of Assets.* By F. T. Maw. London: Butterworth & Co. 1908.

This work is a development of a treatise written by Mr. L. G. G. Robbins on the Devolution of Real Estate, and the third edition was, in consequence of a suggestion made by that gentleman shortly before his death, enlarged into a work embracing the whole of the law relating to Real and Personal Assets. Considerable alterations and additions have been made in the present edition. For instance, Chapter IV, on the Devolution of Real Estate, is much altered and almost re-written. The recent decision in *In re Samson, Robbins v. Alexander*, by settling the controversy over the true construction of Hinde Palmer's Act, has facilitated the remodelling of Chapter XX on Payment of Debts. The considerable number of cases decided since the last edition on the Death Duties, has enabled Mr Maw to add to the section of Chapter XVI, which treats on the incidents of

Death Duties and Appropriation of Legacies, and is more fully treated. Many other additions have been made and numerous cases added ; all of which contribute to increase the utility of a work which renders great assistance to those who have to consider the varied and difficult duties of a personal representative.

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**Fifth Edition.** *The Law of Property.* By J. ANDREW STRAHAN, B.A., LL.B., assisted by J. SINCLAIR BAXTER, B.A., LL.B. London: Stevens & Sons. 1908.

Mr. Strahan takes in every sense "a general view" of the Law of Property. He does not treat real and personal property separately, but considers them together, believing that "where they differ . . . by contrasting them they may be made to illustrate each other." Mr. Strahan has succeeded in arranging his work under a few, and those easily remembered and logical, headings. They are, shortly, as follows :—(1) What interests can subsist in things owned ; (2) How these interests can be held ; (3) How they can be acquired and disposed of ; (4) Rights over things owned by others ; (5) Rights not over physical objects ; (6) Persons under disabilities as to property. This wide range of subjects is treated as fully as is consistent with the size of the work, and clearness is never sacrificed to conciseness as is sometimes the case in general views. A fair idea of the amount of attention devoted to the various subjects may be taken from noticing the space given to each. For instance, Mortgages has about twenty pages ; Wills nearly thirty, and Negotiable Instruments two. An unusual feature for a law book published in England are the references to the law of Ireland which we have found on various points, such as the creation of fee farm grants, various points connected with mortgages, such as tacking and foreclosure ; and the remarkable difference between the English and Irish law as to the validity of gifts by will for offering up masses for the souls of the dead, which, though invalid in England, are good in Ireland. For all references to the law of Ireland Mr. Sinclair Baxter, who is Regius Professor at both Queen's College, Belfast, and Dublin University, is responsible. He is also responsible for the appendices on Copyholds, the Irish Land Acts, Irish Land Purchase, Registration in Ireland, and Ships. We have noticed that, in treating of Adwosons, Mr. Strahan seems to have quite overlooked the important and recent Act, namely, the Benefices Act 1898, an unusual slip for so careful and accurate a writer.

*The Law of Dogs.* By M. R. EMANUEL, M.A., B.C.L. London: Stevens & Sons. 1908.—We recommend this little book to all owners of dogs. They will find the law laid down clearly and sympathetically, without reference to too many cases. We think that Mr. Emanuel might have cited the very recent case of *Hooker v. Gray*, although the animal in that case was a cat. The book is divided into three parts; the first discusses injury to persons by dogs; the second, injury to dogs by persons; and the third, miscellaneous points. The Appendix, which fills the larger portion of the book, contains the Statutes in point.

*The Law of Wills.* By J. ANDREW STRAHAN, M.A., LL.B. London: Sweet & Maxwell. 1908.—We find here, with some additions, the substance of a short course of lectures Mr. Strahan delivered last Michaelmas Term. He does not profess to give more than a bird's-eye view, but, if we may say so, it is that of a bird with a remarkably keen eye. We do not know of anything more useful in its way to a student, and it is a book not to be despised by the practitioner. It is divided into the following headings: (1) The History of Wills, under which it is pointed out that some important peculiarities in the present law arise from the origin of the testamentary power over land; (2) The Drafting of Wills. Under the "difficulty of drafting these," Mr. Strahan gives three great causes and three minor causes. He points out most clearly the difficulties that may arise from the idiosyncrasies or circumstances of testators, and the best way of guarding against them. We have not noticed any reference to a somewhat common habit of referring in wills to papers containing lists of bequests or requests—a practice which may give rise to much trouble. (3) The Execution of Wills; (4) The Proof of Wills; (5) The Operation of Wills; (6) The Construction of Wills. And he concludes with (7) one of the best short accounts of the Death Duties we have come across.

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*District Councils.* By H. D. CORNISH, B.A. London: Stevens & Sons. 1908.—Mr. Cornish's aim has been to complete "a concise guide for the use of members and officers of district councils, and also serve the purpose of a convenient reference for members of the legal profession." The subject is the powers and duties of a district council in its various capacities as a sanitary,

highway, and local government authority. He has followed an alphabetic arrangement, with a certain amount of grouping of kindred subjects under one heading. Perhaps a good illustration of the mode of arrangement will be to give the headings under the letter "A." They are Acquisition of Land ; Adoptive Acts ; Allotments ; Ambulance ; Arbitration ; Audit of Accounts. There are altogether about 50 headings, varying in length from six lines, which are devoted to Ambulance, to about 30 pages given to Housing, and over 60 to Highways and Streets. The treatment, though concise, does not seem too much so for the purpose of the book. Two subjects Mr. Cornish wisely refrains from treating at length. These are the powers and duties of a district council under the Unemployed Workmen Act 1905, and under the Education Act 1902. As both these Acts will probably be much altered in the near future, time and space devoted to them would be wasted.

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*Ecclesiastical Discipline.* By L. L. YEATMAN. London: Sweet & Maxwell. 1908.—Although many text-books have been written on Ecclesiastical law, notably by such authorities as Phillimore and Cripps, there is always room for hand-books adapted to laymen. Mr. Yeatman's book is avowedly compiled for that purpose, and will no doubt prove of great practical utility to the clergy of the Church of England and to laymen interested in the discipline over their pastors. The Church Discipline Act 1840, the Public Worship Regulation Act 1874, and the Clergy Discipline Act 1892, have been dealt with in a simple and direct manner. The scope of these statutes and the procedure, by means of which their provisions are put into force, are clearly indicated. The learned Author has taken a good model of arrangement in following the example of Phillimore's *Ecclesiastical Law*. Ecclesiastical law is a thorny path, and in many works the personal bias of the writer in favour of one party or the other, whether High Church or Low Church, too often comes into prominence. We are glad to see that Mr. Yeatman has avoided the pitfall of displaying personal predilections, and upon this he is to be greatly congratulated. A law book should deal with law in a strictly impersonal and unbiassed fashion.

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*The Law relating to Bills of Lading.* By J. E. R. STEPHENS. London: The Syren and Shipping, 1908.

*The Law relating to Charter-Parties.* By J. E. R. STEPHENS. London: The Syren and Shipping, 1908.—Now-a-days, business

men wish to know something of the law that affects their particular business, so as to obviate hourly visits to their solicitors. A treatise dealing with the subject in involved and technical language conveys little or nothing to their minds, hence the necessity for hand-books to show them in simple language "how they stand." Mr. Stephens has made a special study of supplying this demand within the realms of Shipping Law. As he says, there are two ways of writing a book. One is merely to state general principles and to refer in a footnote to the authorities, without giving any details of the cases decided. This model is only of use to the reader with legal knowledge and a library of Reports of easy access. The other plan is to state a proposition and then give the facts of the more important cases on the point, and now and then quotations from the judgments. This model, although entailing more labour, is the only one of any practical use to business men. Working, then, on these lines, the learned Author has "tackled" the two abstruse subjects of Charter-Parties and Bills of Lading, and the result has been the production of two very excellent hand-books of moderate size and price, which are also simple and easily understandable in their phraseology. In his work on Bills of Lading, he has dealt very fully with the Harter Act of America, and in a manner which will help the merchant to avoid the numerous pitfalls yawning at the feet of the unwary in that Act. Indorsement of bills of lading is a subject which very largely affects the Banking community, and for that reason extensive quotations are made from the judgment of Lord Blackburn and Lord Selborne, in the well-known House of Lords case *Sewell v. Burdick* (10 A. C. 74). The book on Charter-Parties is quite of equal merit to the one on Bills of Lading, the forms in the Appendix being complete and comprehensive. In the Table of Cases, has been inserted the year during which each case was decided, an example which might, with advantage, be more widely followed. In the Index of both books we notice the heading "Words and Phrases," under which is collected words and phrases which have been judicially interpreted; in this way is obviated an annoying search through the Index for the particular one required. We have rarely seen hand-books of superior merit to these, and can only wish for them the same success which apparently has attended the production of *The Law relating to Demurrage*, and *The Law relating to Freight*.



**Seventh Edition.** *The Law of Torts.* By HUGH FRASER, M.A., LL.D. London: Sweet and Maxwell. 1908.—The popularity of Mr. Fraser's compendium is well shown by the rapidity with which edition succeeds edition. It has been published now for over twenty years, and the last edition was issued as lately as 1905. The work is specially adapted for the use of students, and answers that purpose admirably. The principal additions Mr. Fraser has had to make in this edition are to the Trade Disputes Act 1906 and the Workmen's Compensation Act 1906. We do not, however, see how proceedings by a servant against his employer for injuries suffered by the former from an accident can be correctly said to be caused by the *tort* of the latter. Another new Act included is the Dogs Act 1906, in referring to which Mr. Fraser says "a dog is no longer entitled to even one worry," but this of course must be limited to sheep and cattle. If the portion of the work devoted to libel and slander is rather an undue proportion of the whole, it is easy to sympathise with the author for having yielded to the temptation to give space to a subject on which he is an authority.

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**Eighth Edition.** *Shaw's Manual of the Vaccination Law.* By J. LITHIBY, C.B., LL.B. London: Butterworth & Co. 1908.—It is a little over one hundred years since vaccination became almost universal among the educated classes of this country, but it was not the subject of legislation till 1840. Since that time nine more Acts of Parliament have been passed dealing with the subject, the first of which, in 1853, made vaccination compulsory. The Act of 1898 is the one on which the present state of the law mainly depends; it made many important alterations, and established "the conscientious objector," of whom we have heard so much. This "tremendous experiment," as Lord Lister called the Act, has been renewed from time to time, and the last Act on the subject, that of 1907, was passed, we suppose, to make things easier for the conscientious objector, in his wish to prevent his offspring being protected against small-pox. Mr. Lithiby gives all the Acts, Orders, Memoranda, Cases, &c., and in his Introduction gives information which, though not on legal matters, is perhaps more valuable to the community than all the rest of the book. He calls attention to the fact that the intelligent parent can now with ease relieve himself of the obligation to obey the law, and that the only means the vaccination officer can now use to enforce the law is persuasion. He therefore gives for

their benefit the opinions of the majority of the Royal Commission of 1889, which are strongly in favour of vaccination, as the result of a most exhaustive investigation. We are glad to notice that Mr. Lithiby seems to think that the change in the method of obtaining exemption will increase the number of children vaccinated, but we fear he is too hopeful.

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**Twelfth Edition.** *The Secretary's Manual.* By J. FITZPATRICK, F.C.A., and T. E. HAYDON, M.A. London: Jordan & Sons. 1908.—The office of secretary of a company increases every day in importance and difficulty with the continual growth of Company law, particularly Statutory Company law. The number of things he must do or must not do under severe penalties, are continually on the increase. The best thing he can do is to buy this Manual and study it day and night. The changes in the law made by the very recent Companies Act 1907 make it more necessary than ever. A good deal of labour and care have been required to incorporate the provisions of that Act, and much re-drafting of forms. The comfort of a secretary's position will not be increased by the caution given in the Preface to the present edition in regard to the Act of 1907, that "It is to be regretted that the wording of some of the sections is wanting in precision, and raises many difficulties that can only be settled by judicial decision or fresh legislation." The difficulties of that Act commence with the definitions, as it does not seem at all clear what the restriction on transfer of shares, which is one of the necessary conditions of a "Private Company," means. A very important part to secretaries is the full discussion of their position when a company is in difficulties and a receiver is appointed or the company is wound up. The requirements of the London Stock Exchange in respect to the obtaining of an Official Quotation are fully set out. As giving an idea of the care required in discharging statutory obligations, we may refer to a list given on pages 296—308, and which though only purporting to give the most important penalties yet gives no less than 68, and most of which render the offender liable to a penalty of from £50 to £5 for every day in default. It is true that this list includes Perjury and Falsification of Accounts, which are offences that can hardly be committed inadvertently. It would have added to the value of the book, in our opinion, if the text of the Act of 1907 had been given in an Appendix.

## CONTEMPORARY FOREIGN LITERATURE.

*Quelques Observations sur l'Exception de Jeu en Suisse.* By Dr. A. CALEB. Paris: 1908.

A brief discussion of a decision of the Federal Court of Lausanne in 1905, which held that bourse profits and margins could not be recovered by action.

*Die Trennung von Staat und Kirche.* By Dr. KARL ROTHENBÜCHER. Munich: 1908.

The gradual separation of Church and State in most of the western nations is the subject-matter of an exhaustive and complete historical treatment. As a study in politics from the time when, according to the writer, Church and State were one, the book may be read with great profit. At p. 374 will be found a very full and correct account of disestablishment in Ireland and its effects, good and bad. At p. 44 there is an analysis of an almost forgotten work, Gerard Winstanley's *Law of Freedom in a Platform or True Magistracy restored (1651)*.

*Utili Insegnamenti del Diritto Inglese, &c.* By Prof. M. SARFATTI. Turin: 1908.

How the English law of stolen goods and fraudulent dealing with documents of title strikes an Italian jurist. He thinks that under certain circumstances an action based on *colpa aquiliana* would lie. This is a good instance of the survival of Roman law terms in modern Italy.

## PERIODICALS.

*Journal du Droit International Privé.* Nos. V—VI. Paris: 1908.—This indispensable periodical is of course up to its usual high standard. An article by MM. Meili and Plumon on *Les Automobiles en Droit International* is especially interesting, as showing the large amount of legal literature on the subject. *La Presse et les Loteries déguisées en Angleterre* deals mainly with the legality of *Limerick* competitions from the view of a French jurist. There appear to be decisions on both sides of the line. The following decisions on other points are worth notice. The Belgian tribunals do not accept anything like the provisions of Lord Kingsdown's Act. A holograph will made by a Belgian in Holland and domiciled there is not valid unless executed with the formalities

of Dutch law (p. 885). In estimating the sum payable to the family of a person killed by the negligence of the driver of a motor-car, the claims of the *fiancée* of the deceased are to be included. The penalties in this case were considerable, as the driver exceeded 60 kil. an hour. One month's imprisonment, 2,000 fr. fine, 373 fr. costs, 16,850 fr. damages (p. 926). There is an amusing account of the proceedings against the German periodical *Simplicissimus*. One of its cartoons represented an ex-officer of the Deutz cuirassiers saying that as he had been sixty years in the regiment he had naturally forgotten how to write. The officers treated the matter seriously as a reflection on the intellectual capacity of the regiment. The proprietor was fined 100 marks at Stuttgart.

*Zeitschrift für Völkerrecht und Bundesstaatsrecht.* Vol. II. Breslau: 1908.—Dr. Josef Kohler, the editor, has succeeded in issuing a most successful second volume. England and America are well represented. An article by Prof. W. B. Munro on representative government in the Philippines shows that time and tact will be necessary. The review contains a valuable collection of Acts of Parliament dealing with the political and judicial systems of the British colonies, as far as they are affected by imperial legislation. Other notable articles are that giving an account of consular jurisdiction in Sicily (by two professors at Palermo), and that comparing the law of contraband of war among all nations. This is most complete and exhaustive, and covers 130 pages.

*Zeitschrift für Internationales Privat- und Öffentliches Recht.* Leipsic: 1908.—A review of a narrower and more national scope than that of Dr. Kohler, the reason being that questions of Private International law are of a more restricted character. Cases on appointment of foreign guardians and of the *Erfüllungsort* of a contract are discussed on pp. 180 and 182. The Belgian jurist, Ernest Nys, is regarded in a review of his *Droit International* as the modern representative of Sir Henry Maine.

*Deutsche Juristen-Zeitung.* 1 July—15 Sept. Berlin: 1908.—The chief feature is a huge draft, extending to 400 pages, of the proposed new Penal Code for the Empire. Among other notable articles are those on criminal liability for unsworn statements (p. 734), legal education in America (p. 777), and the legal position of the Prussian Herald's College (p. 815). The *Juristentag* was held at Karlsruhe in September, and a report of the proceedings will appear in the *Zeitung* of a later date.

*Giustizia Penale.* 18 June—17 Sept. Rome: 1908.—There are several decisions on the law of 7 July, 1907, forbidding trade on Sundays and feast days. One is to the effect that trading by a person in some other trade than his own is not a contravention of the law (p. 829). This seems in accordance with English law. It is an offence to receive goods stolen in France, provided of course that guilty knowledge (*illegittima provenienza*) can be shown on the part of the Italian receiver (p. 888). Here again modern English law agrees. It is not extortion to write a threatening letter, the delivery of which was frustrated by the police (p. 964). Disaffection of one-third of the crew is necessary to constitute the offence of mutiny (p. 1073). Before a conviction for *pesca abusiva* evidence of objection by the owner of the fishery must be given, but it is discretionary with the judge to receive evidence of the owner's right (p. 1098).

JAMES WILLIAMS.

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Books received, reviews of which have been held over owing to pressure on space:—Lloyd's *Law of Horses*; *Freeth's Death Duties*; Palmer's *The Companies Act 1907*; Selden Society's *Publications*, Vol. 23; Barnett's *Legal Responsibility of the Drunkard*; Holland's *Laws of War on Land*; *Digest of English Civil Law*; Jordan's *A. B. C. Guide to Companies Acts 1862—1907*; Lumley's *Public Health Acts*; Fulton's *Law relating to the Public Trustee*; *Procedure on Motions in Bankruptcy* (Butterworth & Co.); *Encyclopædia of the Laws of England*, Vol. 12; Ingpen's *Law of Executors*; Dicey's *Law of the Constitution*; Porter's *Laws of Insurance*; Beal's *Cardinal Rules of Legal Interpretation*; Maitland's *Constitutional History of England*; Hogan's *Pacific Blockade*; Reitzenbaum's *Decisions regarding German Patents*; *The Annual Practice 1909*; *A. B. C. Guide to Practice*; Cox's *Art of Writing, Reading and Speaking*; Matthews and Spear's *Money Lenders Act 1900*; *The Yearly Practice of the Supreme Court 1909*; *Laws of England*, Vol. III; Vecchio's *Il concetto della Natura*, &c.; Bower's *Code of Law of Actionable Defamation*; Seaborne's *Vendors and Purchasers*; May's *Fraudulent and Voluntary Disposition of Property*; Parmelee's *Anthropology and Sociology in relation to Criminal Procedure*; Kerly on *Trade Marks*; Buckland's *Roman Law of Slavery*; Burge's *Colonial and Foreign Laws*, Vol. II.

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Other publications received:—*Index to Legal Periodicals* (American Association of Law Libraries); Baines' *Guide to the Companies Acts*; Cababé's *Time Limit, Monopoly Value and Compensation*; Smith and Williams' *Philosophy of the Licensing Bill*; Littler's *Compensation in Licensing*.

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Messrs. STEVENS & SONS write:—"Re your notice of *Mews' Annual Digest* in your August issue (p. 489), this is a digest of all cases appearing in any one year, so that a case digested in 1907 appears in the issue for that year, and if reported in any belated report in 1908, will appear again in the issue for this year. The reason for the appearance of the cases you refer to is owing to the late issue of Cox's *Criminal Cases*."





